Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1754

UNITED STATES OF AMERICA,
Respondent,

vs.

376.2 ACRES OF LAND, more or less,
in the County of Morris, etc., et al.

and

WILDLIFE PRESERVES, INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

UNITED STATES OF AMERICA,
Respondent,

vs.

376.2 ACRES OF LAND, more or less,
in the County of Morris, etc., et al.

and

WILDLIFE PRESERVES, INC.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

[Emphasis Ours Unless Otherwise Noted]

Petitioner, Wildlife Preserves, Inc. respectfully prays that a writ of certiorari be granted to review the final judgment dated January 12, 1978 (and the order denying petition for rehearing *en banc* dated February 9, 1978) of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Final Judgment (Judgment Order) of the United States Court of Appeals for the Third Circuit, dated January 12, 1978, appears at (1a) of the appendix hereto. The order denying petition for rehearing appears at (2a)

of the appendix hereto. The final judgment of the United States District Court for the District of New Jersey, Hon. George H. Barlow presiding, dated March 1, 1977, appears at (53a) of the appendix; and the two opinions of the United States District Court appear at (4a) and (18a-19a), the latter comprising a ruling in the course of colloquy with counsel which effectively overruled the initial written opinion of January 10, 1974 (4a).

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on January 12, 1978, and petition for rehearing *en banc* was denied February 9, 1978. Order extending time to and including June 9, 1978 to file this Petition was entered by this Court on May 9, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1651(a).

QUESTIONS PRESENTED FOR REVIEW

1. Has not petitioner, a condemnee whose legal challenge to the constitutionality and propriety of the municipal zoning of its property was pending at the time of taking of its property by eminent domain by the United States of America which legal challenge (in the state courts of New Jersey) was thereafter dismissed on the ground of mootness, been denied its constitutional right to just compensation and to due process of law where the District Court (affirmed by the Court of Appeals) has refused to consider the alleged impropriety of said zoning as of the taking date?

2. Has not petitioner been denied its constitutional right to just compensation and to due process of law where it has been deprived of *any* forum in which to prosecute its contention that the zoning of its property as of the taking date was confiscatory?

3. Has not petitioner been denied its constitutional right to just compensation and to due process of law where it has been precluded from presenting evidence as to the probability of rezoning of its property, as of the date of taking, by virtue of its probable success in a pending state court challenge as of that date and related factors?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This is a federal eminent domain proceeding, and the basis for federal jurisdiction in this case is thus 40 U.S.C. §257 and §258a, and 16 U.S.C. §715. Petitioner's claim is that it has been denied "just compensation" for its property as mandated by *Amendment V to the United States Constitution* and that it has been denied due process of law as mandated by *Amendments V and XIV to the United States Constitution.*

STATEMENT OF THE CASE

1. *Basis for Federal Jurisdiction and the Institution of the Action*

Respondent, United States of America, on March 2, 1971, instituted this action by way of filing a complaint in condemnation and declaration of taking of some 376.2 acres of land located in Harding, Passaic and Chatham Townships, Morris County, New Jersey. The lands were taken because they were situated within the boundaries of the National Wildlife Refuge and were acquired in conformance with the development and administration of that area. The authority conferred upon the United States of America (Secretary of the Interior) by 40 U.S.C. §257 and §258a, 16 U.S.C. §715, and the provisions of the General Appropriations Act, 1951, 64 Stat. 595, 693, is the basis for Federal jurisdiction in this case.

2. *Prior Proceedings*

Respondent instituted this eminent domain proceeding on March 2, 1971, including in its taking some 221.6 acres* owned by the petitioner within the boundaries of what Congress had declared to be the National Wildlife Refuge located in Morris County, New Jersey. Respondent thereafter, as part of the same project, took other lands in 1972 and 1973, not part of this case.

On November 20, 1970, some 3½ months prior to the filing of this suit, petitioner had filed (and there was thus pending) an action in the Superior Court of New Jersey against the Township of Harding challenging the propriety and constitutionality of the existing zoning plan of that

* Other defendant-condemnees, owning the balance of the 376.2 acres taken, either settled or tried their claims to just compensation, were not parties to the hearing below in this matter, and are not parties to this appeal.

municipality, in particular as applied to its lands. The state court complaint charged that Harding Township had, by zoning the subject property for impossible and impractical uses, effectively confiscated the subject properties in violation of both the United States and New Jersey Constitutions and that the zoning was therefore null and void.

As a direct consequence of the respondent's taking of petitioner's lands in Harding Township, the state court dismissed petitioner's complaint on the ground of mootness and lack of justiciable controversy inasmuch as petitioner was no longer the owner of the lands whose zoning was in question. The state court made it clear that it was making no finding as to the propriety or impropriety of the zoning as of the taking date because it considered the issue academic. The New Jersey Appellate Division affirmed on petitioner's appeal and further noted that it considered the impact of zoning as of the taking date to be a matter of Federal Law. The New Jersey Supreme Court declined to hear the matter.

Petitioner also endeavored, in the course of the state court proceedings, to join the United States of America as a party in order that it might be heard on the zoning issue, but the respondent successfully resisted that effort on the basis of sovereign immunity.

3. *The District Court Proceedings*

At one point in the course of the District Court proceedings, it appeared that petitioner would be afforded *some* relief. Petitioner had moved before the District Court, in light of its exclusion from the state courts by virtue of the taking, for leave to attack the zoning directly in the federal eminent domain proceeding. The

District Judge, by opinion dated January 10, 1974 (4a), recognized that by virtue of the denial to petitioner of the state forum it "would clearly be unjust to ignore the probability of a zoning change merely because it is based upon constitutional grounds" and, further, that "the potential unconstitutionality of the zoning is an element to be properly considered in the computation of the compensation to be paid by the United States to Wildlife Preserves." The District Judge proceeded to rule that, nonetheless, petitioner could not directly challenge the constitutionality of the zoning ordinance in the pending eminent domain proceeding as that was not the "proper forum"; but that petitioner would be permitted to demonstrate to the Court in the first instance, that "a willing and knowledgeable buyer would have given recognition to a reasonable probability of a change in zoning due to a constitutional infirmity" and that, if such evidence did not prove "merely speculative", that probability could be presented to the jury as a factor to be considered in computing the amount of just compensation.

At the time of trial, after petitioner had at substantial expense prepared its evidence in accordance with the January 10, 1974 ruling, the District Judge completely reversed his position with respect to the foregoing rulings and, without rendering any formal findings or conclusions, *and without reading the petitioner's extensive offer of proofs*, accepted the respondent's argument that the existence of the pending state court zoning challenge as of the taking date was not, as a matter of law, sufficient to place the probability issue before the jury (18a-19a). The District Judge thereupon excluded all evidence as to zoning change or zoning impropriety—*without hearing such evidence*. As a result, the parties stipulated the values absent that factor and a judgment was entered, specifically preserving petitioner's appellate rights.

4. *The Proceedings in the Court of Appeals*

The Court of Appeals declined to hear oral argument and affirmed the District Court in a one-sentence Judgment Order (1a) which merely cited *United States v. Reynolds*, 370 U.S. 14 (1970) and *United States v. 3.544 Acres in Philadelphia County Pennsylvania*, 147 F.2d 596 (3d Cir. 1947). Petition for rehearing *en banc* was denied without comment (2a).

REASONS FOR GRANTING REVIEW

I. The Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for this court's intervention to prevent the denial of important Constitutional Rights.

In its brief to the Court of Appeals for the Third Circuit, the respondent conceded (Rb11) that petitioner "has been unable to present evidence, in either a federal or state judicial forum, to support its allegation that the R-1 zoning classification in effect at the time of condemnation by the United States was a violation of the New Jersey Constitution and the 14th Amendment to the United States Constitution."

Further in said brief (Rb12), the respondent acknowledged that its filing of a declaration of taking and consequent automatic acquisition of petitioner's property formed the basis for shutting off the state forum.

Finally, the respondent "sympathized" with petitioner's "Catch-22" position and acknowledged "the anomalous juxtaposition of federal and state law which has resulted in Wildlife's inability to pursue its constitutional challenge" (Rb12).

It is precisely these denials of a forum, this "anomalous juxtaposition" of state and federal law, and petitioner's "Catch-22" situation, wherein it has been deprived by the federal taking of its right to show that the value of its property was affected by improper state zoning, which constitute a violation of its Constitutional right to "just compensation." And it is the District Court's sanction of this denial, and refusal even to consider the zoning challenge in the context of just compensation, which renders

its conduct so wide of the mark that this Honorable Court's intervention is required.

The petitioner's right to "just compensation" in the taking of its private property for public use is a fundamental one, inhering in *Amendment V to the United States Constitution*. It goes to the very foundation of the sovereign's right of eminent domain. As Justice Holmes stated for this Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1923):

> "• • • a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The instant petitioner has been dramatically shortchanged by the respondent's actions and positions in this case and by the refusal of the lower courts to permit a showing—to the court in the first instance appropriate later direction to the jury—that by virtue of inoperable zoning, that allowed no reasonable economic use, its lands were substantially more valuable than the amount paid by respondent.

Nonetheless, the procedural and substantive rulings made in this case prevented totally any showing by the petitioner of an element recognized to be critical to evaluation of its property—the zoning of that property as of the taking date. *Port of New York Authority v. Howell*, 157 A.2d 731 (Law Div. 1960), *aff'd* 68 N.J. Super. 559 (App. Div. 1961). Not only was petitioner precluded from demonstrating that the zoning of its property as of the date of taking was illegal, but also it was prevented from showing that its attack upon that zoning would have been successful in the eyes of a willing buyer—i.e., that the fair market value would have been affected by the probability of a zone change based upon its illegality then under attack.

While in the instant case, no abs' te evidence appeared to support a charge of collusion between governmental authorities to maintain the status of petitioner's lands in a depressed financial state by confiscatory zoning in the hopes of achieving a lower condemnation price* the potential for such conduct inhering in the result of this case is self-evident. Moreover, firm evidence of collusion in such case would usually be almost impossible for the ordinary property owner to obtain. All that need be done is the enactment of restrictive zoning, followed by the institution of eminent domain proceedings, and a property owner's right to just compensation is eroded.

The petitioner in this case left no stone unturned in its effort to attain fair value for its property. It endeavored to demonstrate in every way it knew how that, by virtue of its environmentalist position and its holding of its lands as a natural area and in an undeveloped state, it was being prejudiced upon condemnation by restrictive and illegal zoning.** In practical effect, it was denied any forum on these issues and was told that, because of the existence of separate state and federal jurisdictions and entities, it would have no recourse.

The result in this proceeding, if not heard and overturned by this Court, not only demonstrates the abuse of governmental power when there are no checks and balances, but also seems to support the proposition that two

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* It should be noted, however, that in 1965, petitioner's lands were included within the boundaries of the Great Swamp National Wildlife Refuge Project; the Harding Township zoning ordinance was enacted in 1967; and in 1968 the United States commenced negotiations with petitioner, negotiations which turned out to be fruitless since they sought to capitalize on the confiscatory zoning.

** The controversy erupted because the Fish & Wildlife Service insisted upon developing the land and using it as a public hunting and trapping area whereas petitioner was committed to maintaining the acreage in its natural state as a wildlife sanctuary, having accepted donations on this basis.

wrongs *do* in fact make a "right" and that the combination of illegal zoning and failure to permit that illegality to be heard or considered, effectively accomplished a taking without just compensation.

The decision in this case is not limited to the petitioner's property or situation. If allowed to stand, and carried to its logical conclusion, it would open the floodgates for a host of comparable and perhaps even more dramatic injustices. It is well within the realm of reality to conceive of a situation in which, for example, a valuable parcel of business property in downtown New York would be zoned, by a zoning commission, zealous and enthusiastic, for park land (e.g., a pocket park). If such action were followed by condemnation, particularly a federal or federally funded condemnation, the property owner might well be given a minute fraction of the realistic worth of his parcel and, more significantly, be without recourse to attack the confiscatory rezoning which created the problem.

This result is not unlike the famous remark of the queen in Alice in Wonderland: "First the verdict, then the evidence", except that here the evidence was not even considered for the record. Such an outcome, removed from the realm of semantics, is so clearly erroneous as to defy credulity and hardly inspires confidence in the administration and availability of justice. Injustice is such by any name, whether it be in the more sensitive area of personal liberties or, as here, the realm of property rights, equally protected by the Constitution.

II. The Court of Appeals has sanctioned the District Court's departure from accepted Federal and State Law regarding evidence of rezoning probability and as a result has denied petitioner just compensation.

In a case such as this, where the property owner has no other forum—because of the federal pre-emption of the property and the consequent mootness of its state cause of action—the court presiding over the eminent domain proceeding should be charged with a constitutional *duty* to hear these issues. There is a long line of cases permitting collateral attack upon zoning ordinances in eminent domain proceedings, and this case should be included among them. See *Robertson v. Salem*, 191 F. Supp. 604 (D.C. Ore. 1961); *Bowling Green-Warren County Airport Board v. Long*, 364 S.W.2d 165 (Sup. Ct. Ky. 1962); *Business Ventures, Inc. v. Iowa City*, 234 N.W.2d 376 (Sup. Ct. Iowa 1975); *People by Department of Public Works v. Southern Pacific Transp. Co.*, 33 Cal. App. 3d 960, 109 Cal. Rptr. 525 (1973); also see *Annot., Zoning As A Factor In Determination of Damages In Eminent Domain*, 9 A.L.R. 3d 291, 303 (1966). All of the arguments against such attack are absent here: (a) There is no other forum; (b) there is no chance of jury confusion because under *United States v. Reynolds*, 397 U.S. 74 (1970), the *judge* and not the jury can hear the zoning attack; and (c) the "complication" of the condemnation proceeding is insignificant compared to the substantial denial of petitioner's constitutional rights.

In addition to refusing to allow and to hear a direct attack upon the zoning ordinance in the proceeding below, the lower courts refused at trial to consider—*without even reviewing petitioner's substantial proofs* (29a to 52a)—evidence of the pending lawsuit as of the date of taking as indicative of the probability of rezoning thus affecting

value, and thereby sustained the notion that, as a matter of law, such a pending judicial attack on the zoning would be totally irrelevant.

This latter ruling compounds the constitutional denial to the petitioner and reenforces the basic injustice of the result.* It also runs counter to established law to the effect that probability of rezoning is always an element in determining fair market value and that probability may be established either by showing anticipated voluntary change or unanticipated involuntary change. The case law is considerable to the effect that evidence of value for a use prohibited by existing zoning regulations is admissible upon a showing that a change in zoning is probable in the reasonably near future. *Virgin Islands v. 2.7420 Acres of Land*, 411 F.2d 785 (3rd Cir. 1969); *Wolff v. Puerto Rico*, 341 F.2d 945 (1st Cir. 1965); *United States v. 50.8 Acres of Land*, 149 F. Supp. 749 (E.D. N.Y. 1957), *aff'd* 259 F.2d 41 (2nd Cir. 1958), *cert. den.* 388 U.S. 921 (1958); *H & R Corporation v. District of Columbia*, 351 F.2d 740 (D.C. Cir. 1965). Also see *State v. Gorga*, 138 A.2d 833 (1958); *State v. Market Associates*, 340 A.2d 663 (App. Div. 1975); *In re Bruckner Expressway*, 58 Misc. 2d 873, 297 N.Y.S. 2d 171 (Sup. Ct. N.Y. 1968); *Stewart v. City of Baltimore*, 244 A.2d 231 (Ct. App. Md. 1968); *0.040 Acres of Land v. State*, 198 A.2d 7 (Sup. Ct. Del. 1964); *Annot. supra*, 9 A.L.R. 3d 291, 309 ff. (1966); 4 *Nichols, Eminent Domain* (Rev. 3rd ed. 1976). §12-322 [1] and [2].

While the garden variety case of probability of zone change involves proof of probable voluntary legislative

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* This is aside from the denial of due process to petitioner, occasioned by the District Court rejecting its evidence without even reviewing the details of it.

or administrative change, such as a history of granting variances, there is no basis, and no case law support, other than the instant proceeding, for the notion that probable zone change due to pending litigation is not just as viable and persuasive a factor.

The District Court appeared to accept the respondent's argument that such a factor was "speculative" and required the jury to make a legal determination. The Court of Appeals apparently accepted the "speculative" argument by its citation of *United States v. 3.544 Acres in Philadelphia*, 147 F.2d 596 (3rd Cir. 1947), but that case and the entire proposition are inapposite here for two reasons: (i) The jury is *not* being asked to *decide constitutional questions* but only—once the judge under *United States v. Reynolds, supra*, has ruled that evidence of probability is sufficient to reach the jury—that the willing buyer's consideration of probable zone change due to illegality of zoning would affect the price he would pay, i.e., would affect just compensation, and (ii) it is specious to conclude that the proofs offered by petitioner (29a to 52a) are speculative when they were not even reviewed by the District Court, which simply held in effect that no proofs based on pending zoning litigation would suffice.

At least two cases speak to the issue of rezoning probability in terms of successful pending litigation, and one of them (which happens to involve this same petitioner), so holds. In *Palazzi v. State*, 319 A.2d 658 (Sup. Ct. R.I. 1974), the Court said:

> "We hold, then, that evidence sufficient to warrant a finding that such rezoning was reasonably probable must be of such a nature as to establish, if uncontradicted, that the use restrictions then in effect on the land were inconsistent with the comprehensive plan to which the ordinance was enacted. In short, the evidence must be such as to constitute a *prima facie* case on the basis of which a court of equity, pursuant to its coercive power, could, in an exercise of sound judicial discretion, require a recalcitrant local legislature to lower use restrictions on the land to make them consistent with the comprehensive plan. We hold that such evidence, when adduced, is sufficient to support a finding that such a potential change in the use restrictions on land is an element to be considered in reaching a determination of the fair market value of the land at the time of taking."

And in *State v. Market Associates*, 340 A.2d 663 (App. Div. N.J. 1975), the Court expressly held that where a challenge to the zoning regulations was pending at the time of the filing of the condemnation, the court would determine, in the eminent domain proceeding, the likelihood that those zoning regulations would be invalidated. This is precisely what the courts below were asked to do in this case, and the denial of same was a denial of a vital element in the just compensation formula.

The evidence in this case with respect to probability of rezoning was neither remote nor speculative. The lawsuit pending at the time of the taking was a substantial attack upon the bona fides of a highly restrictive ordinance.* As a major legal assault—and as the expert proofs offered indicated—it would have come to the attention of

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* The attack, based of course upon state law, was premised upon a long line of New Jersey and out-of-state cases (state law being applicable), holding that zoning which is unduly restrictive of any reasonable use of property constitutes an unconstitutional confiscation and is void. *Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp.*, 193 A.2d 232 (1963); *Bogert v. Washington Township*, 135 A.2d 1 (1957); *Kozesmik v. Montgomery Township*, 131 A.2d 1 (1957); *Spring Brook Gardens, Inc. v. Board of Adjustment, Springfield Township*, 60 A.2d 288 (Sup. Ct. 1948); *Hager v. Louisville & Jefferson County Planning & Zoning Comm.*, 261 S.W. 2d 619 (Ky. Ct. App. 1953); *Boggs v. Board of Supervisors of Fairfax County*, 178 S.E. 2d 508 (Sup. Ct. App., Va. 1971); *Averne Bay Construction Co. v. Thatcher*, 15 N.E. 2d 587 (Ct. App., N.Y. 1938); and *William Murray Builders, Inc. v. City of Jacksonville*, 254 So. 2d 364 (D. Ct. App., Fla. 1971).

the knowledgable buyer and would have influenced his purchasing decision, for all of the reasons stated in the proofs. The evidence that the litigation probably would have been successful was more than sufficient to persuade the judge to allow the *jury* to *hear*, (and to decide whether to accept) testimony as to enhancement of value.

III. Petitioner was denied due process of law in the "Catch-22" situation created by the State and Federal Courts.

The instant petitioner was admittedly deprived in this case of the right to demonstrate that its properties were worth considerably more as of the date of taking because the existing zoning was illegal and the hypothetical willing buyer would have acknowledged it monetarily.

This situation was described in the Court of Appeals by both petitioner and respondent as a "Catch-22" episode.

"Catch-22" may have been the hallmark of the military in romantic war novels, and an amusing code word for an impossible situation. But there is nothing romantic or amusing to a litigant which finds itself victimized by the apparent reluctance or inability of the federal judiciary to correct a wrong imposed by the federal executive branch and condoned by virtue of long-standing (and understandable) state principles of mootness. "Catch-22" should not be permitted to become the hallmark of a judicial system, and no litigant in the federal courts of this country should be denied due process based upon a shrug which in effect says, "too bad, this is the way the system works."

Petitioner in this case has been deprived of the fair market value of its property. Respondent rendered it in-

capable of establishing that value (to the extent of the zoning factor) in the state courts, and proceeded to block its revival—in any form—in the federal court proceeding. The actions of respondent, witting or unwitting, have contributed to an injustice. The result should not be allowed to stand. The Constitution of the United States should not so easily be circumvented.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

DATED: June 9, 1978

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1588

UNITED STATES OF AMERICA

vs.

376.2 ACRES OF LAND, more or less, in the County of Morris, etc., et al., (Defts.)
and
HARRY J. HAROOTUNIAN and MARY C. HAROOTUNIAN, his wife, (Defts. and 3d-pty. pltfs.)

vs.

JOHN CALDWELL, a/k/a COLWELL, a/k/a COULWELL, MARY CALDWELL (first name being fictitious), his wife, his Heirs, Devisees, and Personal Representatives and his, their, or any of their successors in right, title, and interest, (3d-pty. defts.)

Wildlife Preserves, Inc.,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D.C. CIVIL No. 295-71

SUBMITTED UNDER THIRD CIRCUIT RULE 12(6)

January 12, 1978

Before: ALDISERT and HUNTER, *Circuit Judges*, and CAHN, *District Judge*.*

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* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and in light of *United States v. Reynolds*, 397 U.S. 14 (1970), and *United States v. 3.544 Acres in Philadelphia County Pennsylvania*, 147 F.2d 596 (3d Cir. 1947), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT

R. J. ALDISERT
Circuit Judge

Attest:

THOMAS F. QUINN
Thomas F. Quinn, Clerk

DATED: January 12, 1978

ORDER DENYING PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*, and CAHN, *District Judge*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

R. J. ALDISERT
Judge

Dated: February 9, 1978

OPINION

(Filed January 10, 1974)

Madam and messieurs:

This controversy arises out of a condemnation action instituted in this Court by the United States. The Court has jurisdiction of the entire matter by reason of 28 U.S.C. § 1358.

Prior to the filing of the Complaint in Condemnation and Declaration of Taking, on March 2nd, 1971, the defendant Wildlife Preserves held title to approximately 616 acres of land in Harding Township, New Jersey. This land was zoned R-1, restricting its use to three-acre residential lots. Wildlife Preserves had retained the land in its natural state as a wildlife sanctuary. In November of 1970, Wildlife Preserves filed suit in New Jersey Superior Court alleging that the R-1 zoning was unlawfully confiscatory and seeking a declaratory judgment as to its constitutionality. *Wildlife Preserves v. Township of Harding*, Docket No. L-8670-70 P.W. (N.J. Super., Morris Co., June 25, 1973).

Thereafter, in March of 1971, the United States instituted the present action, condemning approximately 221 acres of the land formerly held by Wildlife Preserves. The subsequent filing of two more condemnation actions divested Wildlife Preserves of title to all but sixty-five (65) acres of the land in Harding Township, and, as to those condemned tracts, deprived Wildlife of standing in the state declaratory judgment action. Wildlife did, nevertheless, still have standing as to the remaining sixty-five (65) acres, and continued to pursue the action on that basis. However, in June, 1973, Harding Township rezoned those sixty-five (65) acreas to a "Farm, Commercial Recreation,

and Commercial Conservation Zone". The land having been rezoned, the state trial court dismissed the attack on the R-1 zoning as moot. An appeal of that judgment is pending.

Wildlife Preserves now seeks to amend the Pretrial Order in this condemnation action to insert the issue of the constitutionality of the old R-1 zoning. It is this Court's view that the condemnation proceeding is not the proper forum for a declaration as to the constitutionality of the zoning ordinance. However, the potential unconstitutionality of the zoning is an element to be properly considered in the computation of the compensation to be paid by the United States to Wildlife Preserves. Wildlife will be granted leave to amend the Pretrial Order for the reasons, and in the manner, stated below.

Initially, the question arises as to what law is controlling in the present matter. The allegation of Wildlife Preserves that New Jersey law governs is without merit. It has consistently been held that the basis for computing compensation in a federal condemnation proceeding is a matter of federal law. *United States v. Miller*, 317 U.S. 369 (1943); *United States v. Certain Land in Newark*, 314 F. Supp. 836 (D.N.J. 1970), *aff'd*, 439 F.2d 670 (3rd Cir. 1971). It is true that the question of what constitutes a property interest for which compensation must be paid is often viewed as a matter of state law. *United States v. Certain Land in Newark*, supra; Annot., 1 A.L.R. Fed. 479 (1969). However, no such question is involved in the present case. There is no conflict as to whether the condemned property is real or personal; there are no leases, no fixtues, and presumably no minerals below the soil. Indeed, there is no dispute as to what property has been taken, but only how much must be paid for it.

Looking, therefore, to federal law, it is clear that the measure of compensation to be paid in a condemnation proceeding is the fair market value of the property as of the date of taking. This is often defined as what the hypothetical willing buyer would pay to a willing seller. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). The question posed here is the relation of existing and prospective zoning regulations to the computation of fair market value. Obviously, the property uses permissible under existing zoning ordinances would bear directly on how much the hypothetical willing buyer might pay for that tract of land. The prospect of any change in the zoning in the reasonably near future may also affect the buyer's appraisal of a fair purchase price. Accordingly, it is generally held that if, as of the date of taking, there exists a reasonable probability of a change in the zoning ordinance in the reasonably near future, such is a proper factor for consideration in valuing the condemned land. *Virgin Islands v. 2.7420 Acres of Land*, 411 F.2d 785 (3rd Cir. 1969); *United States v. Eden Memorial Park Association*, 350 F.2d 933 (9th Cir. 1965); *United States v. 727.40 Acres of Land*, 294 F. Supp. 788 (E.D.N.Y. 1968); *United States v. Certain Land in Baltimore County, Maryland*, 209 F. Supp. 50 (D. Md. 1962).

More properly stated, the issue is not whether a probability of rezoning existed in the absolute sense, but, rather, whether the hypothetical buyer would have felt that there was a reasonable probability of a favorable change in zoning as of the date of taking. *H & R Corporation v. District of Columbia*, 351 F.2d 740, 741 n.1 (D.C. Cir. 1965); *Wolff v. Puerto Rico*, 341 F.2d 945, 946 n.3 (1st Cir. 1965). If the parties to the hypothetical sale of the property would have given recognition, as of the date of taking, to the probability of a zoning change in the reasonably near future, testimony would be admissible as to what premium the willing buyer would pay a willing seller in light of those circumstances.

The burden of proof as to the reasonable probability of a change in zoning lies with the condemnee, Wildlife Preserves. Wildlife must show, to the satisfaction of the Court, that sufficient evidence exists to justify submitting this element to the jury. In *United States v. Reynolds*, 397 U.S. 14, 19-20 (1970), Justice Stewart discusses the effect of Rule 71A(h) FED. R. CIV. P. on the condemnation proceeding:

> "Rule 71A(h) provides that, except in circumstances not applicable here, 'any party' to a federal eminent domain proceeding 'may have a trial by jury of the issue of just compensation,' unless the court in its discretion orders that the issue 'shall be determined by a commission of three persons appointed by it. . . . Trial of all issues shall otherwise be by the court.' The Rule thus provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented. . . .
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> ". . . [W]e think the Rule's basic structure makes clear that a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a compensation award within ground rules established by the trial judge. The Rule gives the trial court discretion to eliminate a jury entirely. And when a jury is afforded, the sweeping language of the final sentence of the Rule discloses a clear intent to give the district judge a role in condemnation proceedings much broader than he occupies in a conventional jury trial. It is for him to decide 'all issues' other than the pre-

cise issue of the amount of compensation to be awarded." (Footnotes omitted.)

Absent sufficient testimony to indicate that the hypothetical buyer would give recognition to the probability of a change in zoning, the jury will not be permitted to consider any increase in value due to the prospect of a zoning change.

Reference should be made to the unique nature of the case at hand. Such arises from the manner in which the defendant alleges a change in the existing zoning ordinance may have come about; namely, by means of a judicial declaration that the existing zoning was unconstitutionally confiscatory. Generally, the validity of a zoning ordinance is not subject to collateral attack in a condemnation trial for the determination of damages, the rationale being that the proper method for such an attack is a declaratory judgment action at the state level. Whatever their motives, the fact is that Wildlife Preserves did institute just such a declaratory judgment action in New Jersey Superior Court prior to the date of condemnation. This condemnation action and the subsequent zoning revision by Harding Township deprived Wildlife Preserves of standing in the state court and rendered the declaratory judgment action moot. As such, Wildlife was effectively denied the alternative state forum. To ignore the probability of a zoning change merely because it is based on constitutional grounds would clearly be unjust.

However, the constitutionality of the zoning of the condemned land is *not* in issue and this Court will not render any declaratory judgment to that end. The only issue is the amount of compensation to be paid to Wildlife Preserves. A factor to be considered in computing that amount, however, is, if it does not prove merely speculative, whether a willing and knowledgeable buyer would

have given recognition to a reasonable probability of a change in zoning due to a constitutional infirmity.

Accordingly, the motion of Wildlife Preserves to amend the Pretrial Order is granted. In light of the nature of the consideration to be given to the question of constitutionality, it would appear more appropriate to allow Wildlife to file an amendment to Paragraph 4 of the Pretrial Order rather than Paragraph 7, and IT IS SO ORDERED. Furthermore, pursuant to the request of Wildlife Preserves, Paragraph 9 of the Pretrial Order will be amended to allow Wildlife, the United States and the Township of Harding forty-five (45) days from the date of the filing of this decision to agree upon exhibits which may be marked into evidence.

Wildlife Preserves has also requested a severance of their cause of action from the main condemnation trial. Rule 71A(b) of FED. R. CIV. P. permits the United States to join unrelated tracts of land for the purpose of trial in one condemnation proceeding. This Court envisions no prejudice, inconvenience or delay arising from the determination of the just compensation to be paid to Wildlife Preserves in the principal condemnation action. As such, the Court does not feel that severance under Rule 42(b) of FED. R. CIV. P. is necessary or desirable. Finally, the decision of the Court in all of the above matters renders moot Wildlife's request for a stay of these proceedings. That application is, accordingly, denied.

An appropriate order will be submitted.

Very truly yours,

/s/ George H. Barlow
GEORGE H. BARLOW,
United States District Judge

NOTICE OF MOTION FOR RECONSIDERATION AND FOR CERTIFICATION OF ORDER

(Original Filed January 24, 1974)

TO: CAROLYN ARCH, ASSISTANT U.S. ATTORNEY
Attorney for Plaintiff
970 Broad Street
Newark, New Jersey 07102

ROGER W. CLAPP, ESQ.
Attorney for Township of Harding
Clapp & Eisenberg, Esqs.
744 Broad Street
Newark, New Jersey 07102

SIRS:

PLEASE TAKE NOTICE that the undersigned, Hannoch, Weisman, Stern & Besser, attorneys for defendant Wildlife Preserves, Inc., will move before the Honorable George H. Barlow, Judge of the United States District Court for the District of New Jersey at the Federal Building, Trenton, New Jersey, on Monday, February 18, 1974, at 10:00 a.m. in the forenoon, or as soon thereafter as counsel can be heard, for reconsideration of the determination of the Court, dated January 10, 1974, of the motion of the defendant Wildlife Preserves, Inc., dated August 24, 1973, insofar as said determination denied this defendant's motion for severance and for stay of the pending condemnation proceeding, and further provided for an additional 45 days within which to agree upon exhibits.

PLEASE TAKE FURTHER NOTICE that defendant Wildlife Preserves, Inc. will further move for certification, pursuant to 28 *U.S.C.* 1292 (4)(b), of the order to be submitted embodying the determination of the Court on plaintiff's motion dated August 24, 1973.

PLEASE TAKE FURTHER NOTICE that in support of the within motion, defendant Wildlife Preserves, Inc. will rely upon the pleadings and papers filed heretofore, and the memorandum of law submitted herewith.

HANNOCH, WEISMAN,
STERN & BESSER
Attorneys for Defendant
Wildlife Preserves, Inc.

/s/ Dean A. Gaver
DEAN A. GAVER, For the Firm

Dated: January 23, 1974

STATE OF NEW JERSEY)
COUNTY OF ESSEX) ss:

I, GEORGE BABCOCK, being duly sworn, according to law, upon my oath depose and say:

1. I am employed by Hannoch, Weisman, Stern & Besser, Esqs., attorneys for defendant Wildlife Preserves, Inc. in the within action.

2. I did, on Wednesday, January 23, 1974, caused to be served by Lawyers Service to Angelo W. Locascio, Clerk of the United States District Court, District of New Jersey, in Trenton, New Jersey, an original and one copy of notice of motion, together with an original and one copy of memorandum of law in this cause.

3. I did, on Wednesday, January 23, 1974, caused to be served by Lawyers Service a copy of the above notice of motion with a copy of the memorandum of law in this cause to:

CAROLYN ARCH, Asst. U.S. Attorney
Attorney for Plaintiff
970 Broad Street
Newark, New Jersey 07102

ROGER W. CLAPP, ESQ.
Attorney for Township of Harding
Clapp & Eisenberg, Esqs.
744 Broad Street
Newark, New Jersey 07102

GEORGE W. BABCOCK

NOTARIZED

TRIAL COLLOQUY AND SECOND OPINION OF DISTRICT COURT

(Filed November 8, 1976)

(2) THE COURT: Gentlemen, do I understand you agree as to the value of this property, absent any evidence as to the premium that might be paid for the property by a hypothetical buyer in terms of evidence as to the attack on the constitutionality of the present zoning; is that so?

MR. ORLOFF: Yes. We have reached an agreement of that value.

THE COURT: What is the value?

MR. ORLOFF: $1,150 per acre.

THE COURT: Do you have an offer of proof with respect to the propriety of having the jury hear evidence as to the offer of proof with respect to the non-constitutionality of the existing township zoning ordinance?

MR. ORLOFF: I do, your Honor, and it involves some rather lengthy reading into the record, which, if the Court would prefer—I have given Mr. Samay copies of the offer that I would make—and I can do this any way the Court directs. I can mark them for identification as though I read them into the record or otherwise.

THE COURT: I think that probably would be preferable, wouldn't it, Mr. Samay?

MR. SAMAY: It would save us time, your Honor, (3) except there is one problem. Mr. Orloff had these delivered to my office this morning at eleven. I did not see them at twelve. At 12:10 I left my office. I have not read through them.

To the extent I would have to rebut for the purpose of this argument what appears in those offers of proof, I

would appreciate if Mr. Orloff could in synthesis form recite what the documents contained rather than reading them into the record.

THE COURT: Is that practical for you, Mr. Orloff?

MR. ORLOFF: It really isn't, your Honor. I think in view of the unusual way in which we are proceding here—I am not putting witnesses on live—and your Honor did indicate your feeling, which I assume you will express for the record. I do want the record in this case to show in as much detail as possible what the people who would have testified would have testified to, rather than simply trying to sum it up in one or two sentences. I apologize to Mr. Samay.

THE COURT: How voluminous is the material? Can Mr. Samay review it in an hour or a half-hour?

MR. ORLOFF: I would think so.

THE COURT: Would you prefer to do that?

MR. SAMAY: The suggestion that I made, your Honor, was not to exclude this from the record. I (4) would be willing to have him mark it for identification and make it part of the record, but for the purposes of this argument, which I understood was directed solely toward your Honor's decision with respect to the admissibility of introducing evidence respecting probability of zoning.

It seems to me Mr. Orloff articulated the predicate for his attempt to indicate evidence respecting probable zoning. Then I could make my argument. It is a legal argument, regardless of what the documents say.

THE COURT: In practice that is the way it would be done, in any event. If we were trying the matter, he would make the offer of proof in general terms, in broad

terms as to what the witnesses will testify, and if I denied it, that would be the end of any witness testifying.

MR. ORLOFF: That might be, your Honor.

On the other hand, given the opinion your Honor wrote in January of 1974, I would think ordinarily I would have the opportunity to at least let your Honor hear the witnesses, even if it is in the absence of the jury, go through it in some detail.

I don't understand your Honor to have repudiated that prior opinion, but rather to have construed it in (5) a way that determines now that there is no kind of evidence that I can put in that will satisfactorily get me to the jury.

I think if I understand your Honor's ruling correctly, I ought to be able to place in the record in as much detail as possible the precise details of what my witnesses would say.

Of course, I can summarize very generally what they would say, but I don't think the record would be fair to my client to leave it at that.

MR. SAMAY: May I make an observation?

Frankly, I was of the opinion Mr. Orloff's attempt to introduce into evidence proofs that there existed in the minds or that there would have existed in the minds of the reasonable, knowledgeable, hypothetical, willing buyer the issue of a probability of a zoning change; that, as I understand it, was based upon a legal conclusion which was or which would have been, if the jury had passed on it, that the ordinance in question would have been ruled unconstitutional.

When we were in your chambers last week, we made arguments with respect to the permissibility of having a jury decide or pass upon the constitutionality of the

statute. My objection to any evidence that Mr. Orloff has to present in this trial is based upon the fact that (6) it requires a jury to make a legal determination respecting the constitutionality of the ordinance in question. I don't really think that an exploration or exposition of the precise proofs that he has to submit with respect to that issue is really pertinent to your Honor's decision.

The question is whether it is permissible for Mr. Orloff to present evidence that is based upon a determination of constitutionality or unconstitutionality by this jury.

MR. ORLOFF: I don't understand it to be quite as simple as that. It seems to me that as I read your Honor's prior opinion, you said the issue for the jury was, assuming the Court determined that there was sufficient evidence that in the mind of the hypothetical buyer the probability of zoning change would be taken into account, you would let the jury consider what premium, if any, what additional value would be given to it in the mind of the hypothetical buyer.

So I think your Honor's opinion is consistent in the sense that you indicated you would make the judgment in the first instance.

Now, as I understand it, you have in our discussion last week in effect made that judgment. I don't see how I can effectively present this to the Third Circuit (7) without the Court having before it the full flesh and bones of what I would hope to show the jury.

THE COURT: If that is so, the only way to properly do it is bring the witnesses down here and have them testify without the presence of the jury, and let me make my determination then, or even with the presence of the jury. This was done originally to avoid the cost of producing expensive witnesses.

MR. ORLOFF: Your Honor, I am cognizant of that, and my understanding was that there was no objection to proceeding in that fashion. Certainly—

THE COURT: The only trouble is if you want to put the documents in as to what witnesses are going to say, Mr. Samay normally would have an opportunity to cross-examine such witnesses, unless he is going to waive his cross-examination. Then you just put your side of the case in. Mr. Samay does not cross-examine, and we have a record which suggests this is what the witnesses would have testified to to the Court or to the jury.

MR. ORLOFF: As I say, in making an offer of proof, it seems to me I have to show what they would say on my examination. If Mr. Samay wants to put in rebuttal proofs of some sort, I wouldn't object to it.

THE COURT: Maybe we are arguing about nothing (8) very significant. Why don't you permit Mr. Samay to look at what you intend to introduce?

MR. ORLOFF: He has had it this morning.

THE COURT: He said he has not had a chance to read it.

MR. SAMAY: I have not read anything other than Mr. Orloff's letter telling me what was in the packet.

If I might interrupt just to make one point, it seems to me, Judge, the question of whether testimony will be allowed that flows out of a legal conclusion by the jury is the question that the Court has to rule on, namely, as I understood our discussion in chambers last week, Mr. Orloff was arguing that there existed a probability of rezoning by virtue of the alleged unconstitutionality of the ordinance in question.

Mr. Orloff suggested, and in fact he stated that if he had the opportunity to prosecute his lawsuit, the issue of the constitutionality of the zoning ordinance may have been concluded in his favor.

Absent the institution of his lawsuit, it seems to me from what I heard in chambers there was no cloud upon the zoning ordinance in question. When I asked Mr. Orloff if there were other facts that allowed for the conclusion, other facts independent of the lawsuit that allowed for the conclusion that there was a (9) probability of a zoning change, Mr. Orloff indicated that there were none.

In fact, it seems that the only fact that gives rise to the question of whether there would have been a zoning change is the existence of Mr. Orloff's lawsuit, and it is to that fact that I object.

I object to it on the grounds that it in and of itself is not a sufficient legal predicate upon which to allow proofs of a probability of a zoning change, because in order for proofs to flow from that fact, a jury has to make a legal determination.

The jury in effect has to determine that the statute or, rather, the ordinance would have been declared unconstitutional. If Mr. Orloff had proofs that the township was considering rezoning, that there had been a plan pending for rezoning, that there were a hundred successful lawsuits challenging ordinances of this kind, I think those might have been sufficient facts upon which a jury could make a judgment that there might have been a probability of a zoning change. But the existence, the mere existence of one lawsuit brought by Mr. Orloff's client with full knowledge that condemnation was imminent is not sufficient factual basis for your Honor to allow the probability issue to the jury, because it is too speculative.

(10) THE COURT: That essentially states my view.

Mr. ORLOFF: May I respond?

I think that does not fully state my position here. My position is that, yes, the pending lawsuit—and it must be emphasized that lawsuit sought a declaration of invalidity as applied to the property owned by my client in this town, including the very property that is the subject of the taking here—that lawsuit is the vehicle for the determination by the experts. But, of course, there are independent facts. The facts are those which would lead the expert witnesses to conclude that a hypothetical buyer, knowing about this lawsuit, would have taken into account this probability of rezoning as the result of the lawsuit. So it really does not give us the full picture to simply say the mere fact of the lawsuit, the lawsuit is undoubtedly the vehicle.

I am not arguing to the Court that Harding Township was voluntarily on the verge of rezoning this property, that there is some use which would make it more valuable. I am not suggesting that.

I said that in chambers what I am suggesting and submitting, and what I think my proofs would show, is that the factors surrounding the zoning, the very kinds of facts that would be testified to in the zoning case (11) in the opinion of the experts and in the view of the hypothetical buyer would lead them to conclude that the lawsuit probably would be successful.

Now, does a jury have to make a legal conclusion to decide on that? No more than they do in any other case; the typical probability case is one in which evidence is put in of variances that have been granted in the surrounding neighborhood for the kind of use the condemnee is claiming a probability of. Those cases go to the jury. An expert is called, testifies that in all probability the condemnee or

his successor in title, the hypothetical buyer, would have gotten a variance from the Board of Adjustment for that use. Is the jury making a legal conclusion in that kind of case?

THE COURT: That is a little different than what the expert witness would have to testify to here. That would be a legal conclusion the ordinance was by law unconstitutional.

MR. ORLOFF: The expert is testifying here the ordinance in his opinion, based upon planning and zoning considerations, is unreasonable, inappropriate, invalid, if you will. I agree it borders on the legal conclusion, but that is the way they testify in zoning cases up and down the state.

(12) THE COURT: That is the way he would have to testify in any suit based on unconstitutionality, I suppose, but that still requires the jury to find, it seems to me, that the ordinance would be found to be unconstitutional and to predicate any award in terms of increased value for the property on that fact.

MR. ORLOFF: That is what I understood your Honor to say in chambers last week. I respectfully disagree. I think the jury simply has to decide whether the willing buyer would have made the kinds of judgments that my experts said the willing buyer would have made, and for good reasons which my experts would give.

I still think whether the ruling is based on that ground or not, I ought to be able to have the appellate record here complete enough so that the Third Circuit can at least look to see what it was the jury would have heard.

THE COURT: If that is it, we will have to do it with all the witnesses and provide Mr. Samay the opportunity to cross-examine those witnesses, if that is it, unless you are

going to do it on a simple offer of proof, which I thought was the original way we thought it could be done, to avoid the expense of bringing witnesses down.

MR. ORLOFF: I thought we left off where I wanted (13) time to assemble my thoughts and put in a complete offer.

If Mr. Samay is concerned about not having enough time—

THE COURT: Let's do this. Take an hour or so and let Mr. Samay look at it. Maybe the information will resolve itself.

MR. SAMAY: I don't believe it is necessary to do that. I certainly don't intend to waive cross-examination respecting the issues Mr. Orloff is presenting for introduction in evidence, because my belief still is the same as I expressed before, that in order for any of these proofs to get before the jury, the jury preliminarily has to make a determination of constitutionality or unconstitutionality. That is a legal judgment which a jury simply cannot make.

For Mr. Orloff to suggest this is the way it was done in variance proceedings is inappropriate to this situation, where there are not a hundred variances approved or disapproved, so the jury could say as a matter of probability, based on the fact of approval or disapproval, something might happen, namely granting or denial of the variance.

In this case, one lawsuit raises the question about the constitutionality of the statute. There is no other factor than that lawsuit for the jury to (14) be able to consider probability of zoning rechange. The jury has to pass on that lawsuit. It has to conclude that the ordinance in question is unconstitutional or constitutional. There is

no other way this fact gets before the jury. And none of the proofs Mr. Orloff has that follow out of that, that flow out of that determination are relevant if the initial determination is that the statute is constitutional. But it is a legal question and a jury can't make it.

MR. ORLOFF: If that is your Honor's ruling, there shouldn't be objection to me placing in the record proofs which I gather would be excluded by the Court, and that will be it. In effect, that will be my offer of proof, if that is the basis for the ruling. That seems to be what Mr. Samay is arguing.

THE COURT: I thought perhaps Mr. Samay would want to cross-examine the witnesses. I don't know that that would change anything in terms of the legal argument.

MR. ORLOFF: His argument is legal. The witnesses should not be allowed to tell the jury—

THE COURT: Why can't he put in what testimony the people would have given?

MR. SAMAY: I have no objection to that. My understanding is there would be a proffer of proof with (15) respect to the probability of rezoning. Other than the existence of his lawsuit I thought Mr. Orloff intended to bring facts to the Court's attention which would have supported the conclusion that there was a probability of a zoning rechange.

All of Mr. Orloff's facts evolve out of the determination of constitutionality which he wants to submit to the jury, which determination is based solely on the existence of his lawsuit. If that is the case, I have no objection to any of this going into evidence. I don't have to cross-examine on it, because my objection to it is based upon my objection to submitting as a factual question to the jury that which is in effect and in essence a legal question.

THE COURT: Well then, that would conclude it, would it not? You can put that evidence in. I don't think you have to read it. Mark it in evidence and file it with the Clerk.

MR. ORLOFF: Technically I am marking it for identification.

THE COURT: Mark it all for identification.

MR. ORLOFF: Shall I do that now?

THE COURT: Have the Clerk mark it for identification. Then you can make a short statement, unless it is already made, as to constitutionality of that (16) statement.

I suppose the government properly should move for a directed verdict on the grounds that you have stipulated as to the value of the property absent this testimony.

MR. SAMAY: That is correct.

THE COURT: I don't think you should agree to the directed verdict, I suppose because you are still contesting it on the grounds you should be permitted to introduce the testimony.

MR. ORLOFF: I am not agreeing to it. My understanding is as follows, and maybe we can get it straightened out:

Your Honor is ruling out this evidence of rezoning probability. We are treating the balance of the case, which is really the question of value absent the rezoning issue, as though there had been a verdict in the amount of $1,150 per acre.

The only additional point of it is this, I have agreed and Mr. Samay has agreed, as I understand it, that in the

event there were a reversal and remand by the Third Circuit, that $1,150 as the base value would stand. We would not attempt to introduce any evidence.

THE COURT: That is fine.

MR. ORLOFF: Therefore, subject to what I gather (17) is his need to get approval from Washington for this disposition, so he tells me, I gather we can present the Court with a final judgment in the matter which will be a judgment for the condemnee in the amount based on $1,150, and which will also, I suppose, direct a verdict against me on the probability of the rezoning issue, so that I can take that up.

THE COURT: Yes.

MR. ORLOFF: It will be a final judgment.

I assume if it is approved it will be paid in the ordinary course, as any other final judgment, even though a portion of it is on appeal.

THE COURT: You have to have a final judgment to appeal to the Third Circuit.

MR. SAMAY: The settlement will be submitted to the Attorney General, since it requires his approval, it being over $250,000. It will be forwarded to Washington with my strong recommendation that it be adopted. I really believe that it will be adopted. However, I can't make assurances for what the Attorney General might do.

In the event the Attorney General disapproves the settlement, we will have to retry the case.

THE COURT: Have to try the case from the beginning to the end.

(18) MR. SAMAY: But it is my expectation that will not happen.

MR. ORLOFF: I assume we should hear before the year is over?

MR. SAMAY: I would hope so.

THE COURT: Then you want me now to enter a directed verdict in the amount of $1,150 an acre for how many acres?

MR. SAMAY: 221.6.

MR. ORLOFF: I have all the calculations. There is also an interest factor.

THE COURT: You want to give me whatever I have to have to enter that directed verdict?

THE ORLOFF: The total dollar amount of value is 221.6 acres times $1,150 an acre, which I calculate $254,-840. The United States paid into court originally $188,-600, leaving a principal differential of $66,240. I have computed interest on that differential from the date of taking, which was March 2, 1971, through November 2, 1976, because it is an even fall, at 6%, that is five and a half years, slightly over five and a half years, I guess, five and a half years plus a month. I get 33.5%.

THE COURT: Do you have any quarrel with that?

MR. SAMAY: No, your Honor. I indicated to Mr. (19) Orloff I accept his figure, subject, of course, to the computer verification.

MR. ORLOFF: That makes the total interest, your Honor, up to November 2 of $22,190.40, or a total of principal and accrued interest of $88,430.40.

Then my calculations show you would add $10.89 a day to the date of judgment from November 2 of this year, and, of course, your Honor is not going to sign this judgment until the Attorney General approves it, so that would

be the calculation. I could supply that to your Honor by letter, if you want.

THE COURT: Fine. I will enter a directed verdict in those amounts, and I will deny your application to introduce testimony with respect to the increased value of the property, with you being permitted to introduce evidence that the ordinance would be held to be unconstitutional.

MR. ORLOFF: I think it is clear from the record that my stipulated verdict with Mr. Samay at $1,150 an acre is without prejudice to my often-stated intention to appeal your Honor's ruling.

THE COURT: If the Third Circuit thinks I am in error, we will start with a new jury trying merely the fact of whether that figure should be increased.

MR. ORLOFF: That is right.

(20) THE COURT: Start from that base figure.

MR. ORLOFF: That is correct.

I will place my offer of proof on the record.

The first offer of proof of testimony to be marked D-1 is the testimony of P. David Zimmerman.

The offer of proof of testimony of John O. Lasser will be D-2 for identification.

D-3 of the offer of proof will be the testimony of Thomas J. Scheil.

The offer of proof of D-4 will be the testimony of William F. Selders.

D-5 will be the complaint, a certified copy of the complaint filed November 20, 1970, in the Superior Court of New Jersey, Law Division for Morris County, Docket L-8670-70-PW, Wildlife Preserves, Inc., Plaintiff, v. The Township of Harding, Defendant.

D-6 is an oral opinion of the Honorable Charles M. Egan in the matter last referred to, dated June 25, 1973.

D-7 is an opinion of the Superior Court, Appellate Division, dated May 21, 1974, affirming Judge Egan.

D-8 is a portion of a road map of the New York-New Jersey Metropolitan Area, showing the location of the subject property.

D-9 is a zoning map of Harding Township, revised April 1969, showing in yellow the subject property.

(21) D-10 is the proposed site plan referred to in the offered testimony of Mr. Zimmerman.

D-11 is a blow-up of the portion of the road map of Harding Township and surrounding towns referred to in the testimony, the offered testimony of Mr. Zimmerman.

D-12 is the Harding Township Zoning Ordinance in effect as of the date of the taking referred to in the testimony of Mr. Zimmerman.

THE COURT: Maybe these will have to be marked in evidence? I am not sure that is so. The Court of Appeals considers matters that are marked for identification which are not permitted in evidence, and there is argument made as to their introduction.

MR. ORLOFF: Probably would be excluded, as would be the testimony, as I understand the Court's ruling.

MR. SAMAY: It seems to me, your Honor, that the purpose of your viewing these documents and submissions is for you to make a determination whether the evidence on the whole, that which is legally accepted into evidence, persuades you that the question of the speculativeness of a zoning rechange is such as would disallow you from submitting this to the jury for its consideration, so I don't

think these things have to go into evidence. I think it is sufficient if they are marked (22) for identification, because if your Honor ruled that the question of zoning change was speculative on the basis of these documents, it would never go to the jury and never go in evidence.

THE COURT: Yes.

MR. ORLOFF: It goes along with the testimony which your Honor is not allowing in.

D-13 is the topographic map showing the subject property. This is a composite of two sheets prepared in April-May 1960, Passaic River Basin, New Jersey, Great Swamp Area, prepared by the U.S. Army Corps of Engineers.

Lastly, your Honor, D-14 I would like to mark or at least file with the Court the request to charge that I would have presented to the Court.

THE COURT: All right, fine.

MR. ORLOFF: Does your Honor want them filed or marked as an exhibit?

THE COURT: Marked as an exhibit.

All right, gentlemen. Is that it?

MR. ORLOFF: I take it Mr. Samay will present the judgment after he hears from Washington.

THE COURT: Yes, as promptly as possible.

Thank you. We will take a brief adjournment.

(Exhibits D-1 through D-14 marked for identification.)

PETITIONER'S OFFERS OF PROOF

TESTIMONY OF P. DAVID ZIMMERMAN

1. He is a licensed professional planner under the laws of the State of New Jersey.

2. He has an undergraduate degree in City Planning from Rutgers University, a Masters Degree in City Planning from the University of Pennsylvania, Certificate of Community Development from the University of Denver and post graduate courses at Livingston College, Rutgers University and Rutgers Law School. He is currently enrolled in the Ph.D. City Planning Program at Livingston College, Rutgers University. Mr. Zimmerman has approximately twelve years planning experience. For the last three years, he has been self-employed as a Planning Consultant with offices at 42 Court Street, Morristown, New Jersey. As a Planning Consultant, he has been retained by a variety of clients including municipalities, city groups and builders and developers. Mr. Zimmerman for the last four and one-half years has been on the Urban Studies Faculty of Rutgers University. Prior to being self-employed, Mr. Zimmerman worked for the City of Jersey City, the Morris County Planning Board, City of Philadelphia, State of New York, several planning consultant firms and was employed abroad as a planner. For the last several years, the major geographical area of work has been Morris County, New Jersey. He has testified on numerous occasions in the Superior Court of New Jersey in connection with planning and zoning matters, and has rendered opinions in such proceedings regarding the unreasonableness or arbitrariness and propriety of various municipal zoning regulations. He has testified as an expert witness for both the developer or plaintiff and, in other cases, for the defendant municipality, in cases where the constitutionality of a zoning regulation was under challenge. He has also testified before various municipal boards of numerous

townships in New Jersey, including Boards of Adjustment, Planning Boards and governing bodies with respect to zoning and planning matters. He has been retained by various municipalities to advise them with respect to their zoning ordinances and to help, in terms of planning and zoning advice, in the preparation of zoning ordinances.

3. He is and has for a number of years been familiar with Harding Township, and the zoning and planning characteristics of that municipality. In the early 1970s, he was retained in connection with an application for a variance for the construction of garden apartments in Harding, which variance was denied at the local level, granted by the trial court (which declared Harding's zoning of that tract unconstitutional), and after an appeal to the Appellate Division and further discussion with the Township, has resulted in the approval of a plan for the construction of attached multi-family structures in the form of town-house units.

4. He has been retained in the present case for the purpose of reviewing the history of zoning and planning in Harding Township and the region surrounding the community, the zoning developments referrable to the area and the legal decisions well known and accepted by professional planners, rendering an opinion as to the reasonableness of the zoning of the subject tract as of March 1971, and the probability of its change, and rendering an opinion as to the most appropriate and most probable use of the subject property as a result of change or invalidation of the R-1 zoning of the subject property.

5. He would describe the location of Harding Township as follows: Harding Township is located within the Newark metropolitan area. It is in fact approximately 20 miles from the central business district of Newark, and approximately 30 miles from Manhattan, New York City. In this

connection, there are a substantial number of residents of Harding Township which do commute to both Newark and New York for employment (as reported in the 1970 census). In addition, Harding Township is in close proximity to more developed centers in Morris County, such as Morristown, Madison and Chatham. In order to observe the location of Harding Township and the subject property within Harding Township, he has enlarged a copy of the official Morris County map, prepared as of approximately 1969, by the Morris County Board of Freeholders (map is marked as Exhibit D). This map clearly shows the close proximity of Harding Township has to the three communities mentioned earlier, Morristown, Madison and Chatham. In addition, it shows a major state highway, Route 202 traversing Harding Township and the proposed Interstate 287 likewise traversing Harding Township. Residents of the township are very accessable to commuting railroads with stations at Convent Station, and Madison, which are approximately a few miles from the municipal border to the North, and a commuting railroad to the Sough with stations conveniently located at Berkeley Heights, Gillette, Sterling, Millington, Lyons and Basking Ridge.

6. In connection with his analysis and testimony, he has reviewed various data including the zoning ordinance of Harding Township in effect as of March 2, 1971 (Exhibit D), the proposed preliminary master plan published in 1970, topography maps of the area (Exhibit D), census data published by the U. S. Census Bureau of 1970, publications of the Morris County Planning Board, the complaint filed by Wildlife Preserves, Inc. in November 1970 challenging the zoning of Harding Township as applied to its tracts, comments regarding the zoning of the subject area made by the consulting planner employed by the Township of Harding in testimony taken in that case, judicial decisions with which he is familiar as a planner and

of which he receives notice in professional planning publications, and his own personal observation of the site and inspection of various areas of the Township.

7. As of March 2, 1971, Harding Township was zoned as follows: Approximately 97.3% of the Township was zoned R-1, which provided essentially for one family homes on lots of not less than 3 acres. The balance of the land in the Township was allocated among higher density residential use and office laboratory use, constituting only 2.7% of the total lands of the Township.

8. The restrictiveness of Harding Township's zoning was a subject of professional discussion and communication among professional planners in the area in the period 1970-1971 and during the late 1960s when he was an employee of the Morris County Planning Board. The consensus of opinion among planners was that the blanketing of the town with such a low density single purpose zoning was unduly restrictive, unreasonable, and likely to be declared invalid by a court as, if and when a concerted attack was made against it.

9. The factors that go into his decision as to the reasonableness of a zoning ordinance and in particular the reasonableness of the Harding ordinance as applied to the site, include the following:

(1) Whether the land can be practically utilized for a reasonable purpose and whether that reasonable use is economically feasible.

(2) Whether the uses permitted satisfy the statutory purposes of zoning and in particular promote the general welfare and

(3) Whether the uses permitted are appropriate to the characteristics of the site in question with specific reference to its location, surrounding use, topography and soil characteristics.

10. He did go on to say that the foregoing type of question, and his further opinion as to whether particular zoning is reasonable or not, is commonly asked of him in zoning challenging proceedings in the Superior Court of New Jersey and that his opinions on the subject in such cases have been referred to by the courts and municipal bodies in arriving at their conclusion on the subject.

11. Given the history of the zoning of Harding Township as of March 2, 1971, the existence of the pending challenge of the zoning by Wildlife Preserves as of that date, the location and topography of the subject property, the needs of the region from a zoning and planning standpoint, environmental questions, and, last but by no means least, the economics of developing the property based upon homes on 3 acre sites (including the cost of stripping and filling as testified by Mr. Scheil), he has an opinion as to whether it was a reasonable probability, as of March 2, 1971, whether the zoning regulations affecting the subject property would be changed. This opinion is that it was reasonably probable that it would be changed by virtue of the pending court action.

12. He would go on to say that the basis for his opinion is that as a planner and zoning expert, the zoning of the subject property for 3 acre residential use was neither reasonable nor appropriate, and in fact constituted a denial of a reasonable or economic use of the subject property. The reason for this conclusion as to unreasonableness is as follows: As the property now stands, it is impossible to develop it for single family homes on lots of 3 acres in size. The practical effect of attempting to do this would necessitate substantial alterations in the topography and soil of the area such that if and when homes were built, they would be so exhorbitant in price, which would render them unmarketable—due, of course, to the exhorbitant site

improvement costs as demonstrated by Mr. Scheil's testimony. What all of this means, as a bottom line, is that the zoning in effect regulates the use of the land to such an extent that it makes it economically unfeasible to use it for any reasonable purpose, and that has been considered by the courts to be improper and to make such an ordinance invalid. He is familiar with court decisions that are part of a planner's on-going education, including a decision such as the *Morris County Land* decision in 40 N.J. 531, which states this principle, which is a basis principle and consideration of good planning and zoning. Further witness to the practical inutility of this land in the R-1 zone is the fact that there are abundant parcels in Harding Township which are readily developable and saleable, as of 1971, for single family homes on 3 acre lots and would not be burdened by the need for extensive and unreasonable site preparation costs. One of the required considerations in zoning is to conserve the value of property and encourage the most valuable use of land throughout the municipality. This is a concept which is set forth in the New Jersey zoning statute. The 3 acre zoning as applied to this property would destroy rather than conserve the value of the property and would discourage rather than encourage the most valuable use of the land in this municipality.

13. Given the unique soil and topographic characteristics of the property, the purposes of zoning would not be advanced by developing it for single family homes on 3 acres, but rather utilizing areas of the property that are developable for particular types of housing that lend themselves to clustering and in that way better utilizing the site and its characteristics. Lastly, it is his opinion that the forced zoning of this property for single family homes would not satisfy the general welfare criteria of zoning in that there are more than enough areas so zoned throughout

the county and region, and that this area can more appropriately be developed for housing which is in critical need by the population of the region of which Harding is a part.

14. He would state that in his experience, and he has been consulted and hired by numerous developers, land purchasers and speculators, the potential zoning change in an area is taken into account by the prospective purchase; and, also, in his experience, the potential of a successful legal attack upon existing zoning is taken into account on many occasions by the purchaser in arriving at his decision of whether to purchase and at what price to purchase. Based upon his experience, it is his opinion that a knowledgable buyer in March of 1971 would have been aware of the existence of the Wildlife suit challenging the Harding zoning as to its property and would have given recognition to a reasonably probability of a change in the Harding zoning, based upon that pending suit and the related considerations which he has stated above as being reasons why the zoning was defective.

15. He would also testify that based upon his aforesaid review and his experience, in the event the 3 acre zoning was invalidated by the court with respect to this property, the most probable and appropriate zone for the subject property, and the use most likely to be zoned for or permitted by way of variance would be some form of fairly low density multi-family housing, in particular garden apartments. The reason that this is the most likely use that would be permitted is that there is a crucial need in Harding Township and the region for this type of housing and that this site is well situated in Harding Township and the region such that it would be particularly attractive to the prospective garden apartment dweller. It is a fact that Harding Township as of 1970 had no multi-family housing, that Harding Township was projected by the

Morris County Planning Board to grow to more than double its population in the decade from 1970 to 1980, and the proximity of this site to major transportation arteries and large numbers of job opportunities make multi-family apartment use of this site most appropriate.

16. In addition, he would say that since the primary reason for the 3 acre residential zoning being invalid was that it was economically unfeasible, and therefore, prevented any reasonable use of the property, a use would have to be permitted which was economically feasible consistent with other zoning and planning considerations. The multi-family use is essentially the only kind of use which is economically feasible and yet manages to preserve some of the positive natural characteristics of the site. Commercial and industrial use of the site would not be appropriate.

17. Based on the probable use as a result of the invalidity of the ordinance, he has developed a site plan which conceptualizes multi-family development. While such a plan might not be precisely what would be permitted in all of its details, it does carry out in essence all of the required probable zoning functions, while yet giving proper consideration to the use of the property. The site plan drawing is marked as Exhibit D.

18. The site map may be described as follows: The total area of 221 acres was divided for planning purposes into two parcels of 106 acres and 115 acres. The multi-family plan was developed exclusively on the 115 acre parcel and was drafted to include 396 living units. Thus, the density of this development is very modest at 3.4 gross units per acre. However, only a portion of this 115 acre tract will be developed for the multi-family structures, parking lots and adjacent green space amounting to approximately 53.3 acres in total. Thus, the net density is

7.4 units per acre or 396 units developed upon 53 acres. This density in his experience is extremely modest and low, especially when compared to that permitted in the zoning ordinance of adjacent municipalities. The plan envisions primarily one bedroom units and estimates a total population for the units of approximately 825 persons or slightly over 2 persons per dwelling unit. The balance of the 115 acres not developed amounting to approximately 61.7 acres will be left in its natural state with access to the multi-family units by way of paths, walk-ways and other scenic amenities.

19. In terms of traffic impact which he has considered in terms of preserving the environment in terms of retaining as much of this property as feasible in its natural state, and in terms of the most appropriate use of this property, this plan is in his opinion far superior to any other and, assuming as he does that the appropriate municipal bodies of Harding would act lawfully in discharging their duty following the invalidity of the zoning, this would be the most probable use to be permitted.

TESTIMONY OF JOHN O. LASSER

JOHN O. LASSER will testify as follows:

1. He is a licensed real estate broker and appraiser in the State of New Jersey.

2. He is the President of John O. Lasser Associates located at 11 Commerce Street, Newark, New Jersey.

3. He has been actively engaged in the practice of real estate appraising and consulting in the State of New Jersey for the past 22 years.

4. He is a graduate of Yale University and received a B.A. in 1952 and has taken courses in various phases of real estate appraising given by the American Institute of Real Estate Appraisers.

5. He has also served as an instructor in courses on basic real estate appraising and advanced real estate appraising at Rutgers University.

6. He is a member of the American Society of Real Estate Counsellors and a member of the American Institute of Real Estate Appraisers where he currently serves as a member of the governing council.

7. He also was President of the New Jersey Chapter #1 of the New Jersey Institute of Real Estate Appraisers in 1975.

8. He has been actively engaged in the appraisal of real estate properties throughout New Jersey since 1954 and has made appraisals on almost every type of real estate, multi-family residential property, including both high rise and garden apartments, industrial, commercial, and special purpose properties, including service stations, truck terminals, waterfront properties, warehouses and vacant land.

9. He has appraised property for various branches of the United States Government, including the General Services Administration, United States Army Corps of Engineers and the National Parks Department. He has made appraisals for various departments of the State of New Jersey, including the Department of Environmental Protection, the Department of the Treasury, and the New Jersey Turnpike Authority. He has appraised property for many municipalities throughout the State, including Newark, Fort Lee, Trenton, Jersey City, Passaic, Atlantic City, and Hackensack.

10. His clients also include most of the major banks and insurance companies as well as a great number of private property owners.

11. Special assignments including large parcels of vacant land include work for the United States Army Corp of Engineers on appraisals of property located along the Delaware River in Warren and Sussex Counties, the appraisal of 17,000 acres of land in Hunterton, Warren and Somerset Counties for Round Valley, Inc., the appraisal of the Geraldine Rockefeller Dodge Estate of 450 acres in Madison and Chatham Townships, and the appraisal of the McEvoy Estate of some 2,000 acres is upper Passaic County.

12. He lives within approximately 10 minutes of the subject site and has a continuing familiarity with it.

13. He has specifically inspected the subject site on a number of occasions since 1972 in connection with this matter. He has studied the topographical maps (Exhibit D-), the zoning maps, survey of the subject site, and is familiar with the zoning ordinances covering the subject property as of the date of taking.

14. He was retained to estimate the fair market value of the subject property as of the date of taking. In view of the factors present in this case, he has, in making such estimate, considered whether the hypothetical willing buyer would give recognition to the probability of a zoning change and the extent to which that recognition affects the value.

15. He would identify the date of taking as March 2, 1971, and would describe the property by reference to the date of taking maps (Exhibit D-).

16. He would describe the property and the surrounding property essentially as follows:

(a) The property is located on the east side and west side of Long Hill Road near its intersection with Pleasantville Road in Harding Township, Morris County, New Jersey. The property has a frontage on the east side of Long Hill Road of approximately 1,400 feet and a frontage on the west side of Long Hill Road of approximately 2,500 feet and 1,250 feet. The overall plot is irregular in shape and contains 221.6 acres of land area. Electric and telephone service are available at the site.

(b) The property is crossed by the Great Brook west of Long Hill Road and adjoins the Algonquin Gas pipe line at its northerly side. The site ranges in elevation from 228 feet above sea level to 237 feet above sea level.

17. As an appraiser, in order to make his appraisal, he did the following:

(a) He physically inspected the site on a number of occasions, he examined public documents relating to the property including the tax maps, topographical survey, zoning regulations and dates showing comparable sales, inspected sites of the comparable sales, generally familiarized himself (he was already familiar to a large extent) with the market at that time for one family homes and garden apartments.

18. He would define fair market value as follows:

(a) The highest price estimated in terms of money which the property would bring if exposed for sale in the open market by a willing seller, neither buyer nor seller acting under compulsion, both having a full knowledge of all of the uses and purposes to which the property is adapted and for which it is capable of being used, and both exercising intelligent judgment.

19. Based upon his own experience and knowledge of the area and of the market existing in 1971, and based upon the testimony of Mr. Zimmerman as to proper and reasonable zoning of the subject site, the testimony of Mr. Scheil regarding the cost of site improvements for one family homes on 3 acre lots, and his knowledge of the existence of Wildlife's challenge to the zoning ordinance which was pending as of the date of taking, he has an opinion as to whether the hypothetical willing buyer would have given recognition, as of the date of taking, to the probability of a zoning change in the reasonably near future. His opinion is that the willing buyer would have given such recognition, for the following reasons:

(a) That it is not economically feasible to use the property as it is presently zoned and that the property has therefore been zoned into inutility;

(b) That there is a demonstrated demand for a variety of residential housing types in the region of which Harding Township is a part;

(c) His knowledge of lot sales in the area at that time indicates that a buyer would be able to purchase a filled and graded lot of 3 acres for between $15,000 and $20,000,

thus corroborating the impractical use of the subject property for 3 acre lots, where the grading and filling cost alone would run between $22,000 and approximately $60,-000. In other words, there would be no market for the subject lots to speak of;

(d) There was a demand among developers and builders during the period from 1970 to 1971 for sites suitable for garden apartment construction in the Morris County area and developers were, in his experience, offering premiums for potentially good sites even where zoning change was still required, particularly in areas where the Town had not provided for multi-family dwellings;

(e) In his opinion the knowledgable buyer would obtain knowledge of the exact zoning status of the property he was interested in and the existence and content of any legal proceedings affecting that status;

(f) In his opinion, therefore, an estimate of the fair market value of the subject property as of the date of taking would of necessity have to include an element of value based upon the reasonable probability of a zoning change, because this is what the hypothetical buyer would consider.

20. He has arrived at an opinion as to the value of the subject property given the reasonable probability of a zoning-change. His opinion is that the value is a total of $2,420 per acre, or $536,200 for the 221.6 acres. In estimating this value, he has taken into consideration the testimony, with which he concurs, regarding the probability of a multi-family use, and has assumed a site plan along the lines of that presented by Mr. Zimmerman (Exhibit D-), inasmuch as such a site plan, for this area, represents a low intensity use of the site—a use which the knowledgeable buyer would consider to have a reasonable chance of success.

21. He would explain the reasoning behind his valuation as follows: The 115 acre section of the parcel would contain 396 units at $2,000 per unit, or a total of $792,000. This price peru nit is arrived at by taking comparable sales, listed as per attachment, which, based on his evaluation, would result in a per unit value for such apartments, if the use were already permitted, of 2,500 per unit. He discounts that figure in coming to his $2,000 per unit figure. From the aforesaid $792,000 he deducted $362,400, consisting of $178,700 as site development cost as per the testimony of Mr. Scheil and $183,700 for sewerage treatment plant as per the testimony of Mr. Selders, leaving a net value of this particular section of 115 acres of $429,600. In addition, he had concluded that the 106.6 acres be valued at $1,000 per acre, or a total of $106,600, based upon comparable sales for the lower lying areas as similarly zoned.

22. The foregoing makes a total of $536,200, which is his opinion as to the fair market value of this entire tract as of the date of taking, giving consideration to the reasonable probability of zoning change.

23. Assuming hypothetically the total absence of any zoning change, it is his opinion that the property would be worth an average of $1,200 per acre overall, or a total of $265,900. The reasonable probability of zoning change would, in his opinion, result in a premium of $1,220 per acre, bringing the total value to $2,420 per acre. This premium may be explained in another way: If the subject property were already zoned for garden apartments of the density discussed, it would be worth, for the entire 221.6 acres, a total of $3,313 per acre. If there were no probability of zoning change, the present acre value would be $1,200. Taking into account the probability of a zoning change results in a value between the above two figures which has been fixed at a total of $2,420 per acre.

24. He would go on to discuss in some detail his comparable sales, which are being marked in summary fashion as an exhibit for the purpose of this proceeding.

TESTIMONY OF THOMAS J. SCHEIL

1. Mr. Scheil is an associate and Project Manager of Joseph S. Ward and Associates of Caldwell, New Jersey, Consulting Soils and Foundation Engineers.

2. He has been with the Ward organization since 1962.

3. He is a licensed professional engineer in New York and New Jersey, and is a member of the American Society of Civil Engineers.

4. He received his B.S. in Civil Engineering from Manhattan College in 1961 and took post-graduate courses in soil engineering at Newark College of Engineering in 1964.

5. The Ward firm, and Mr. Scheil in particular, specialize in sub-surface investigations relative to design of building foundations, analysis of sub-surface-foundation materials necessary for construction on particular locations, and analysis of necessary site preparation work and the cost thereof.

6. Mr. Scheil's experience includes the following: Project Manager in charge of numerous large development projects including: Flatlands Urban Industrial Park, Brooklyn, New York; Rutherford Industrial Park, Rutherford, New Jersey; Lyndhurst Office Park, Lyndhurst, New Jersey; Southwest Sewer District No. 3, Suffolk County, New York; Suffolk County New York Ocean Outfall; Hoffman-LaRoche Complex, Belvidere, New Jersey; Hartz Mountain Industries, Inc., Secaucus, New Jersey; and waterfront developments including Mobil Oil Corporation, Brooklyn, New York; Nimco Plant, Newark, New Jersey; North Hudson Hospital, North Bergen, New Jersey. Also, numerous individual low and high rise structures including: Housing for the Elderly, West Haven, Connecticut; Syrtel Office Building, Syracuse, New York; Bethany Manor, Keyport, New Jersey; and Century Towers, Weymouth,

Massachusetts. Also, the Federal Aviation Agency, Navaids Division, Jamaica, New York, 1961-1962; Field Engineer in charge of site selection for air navigational aids (VOR and VORTAC Installations) along the east coast of the United States. Projects located in Kentucky, Tennessee, New Jersey, New York, Connecticut and Pennsylvania. Site selection involved land negotiations, surveying and mapping, and electrical power survey.

7. He was retained in this case for the purpose of studying and analysing the site and determining fill costs, stripping costs, and other site preparation costs under both R-1 zoning and an assumed zoning or development permitting garden apartments.

8. He was also retained to determine the feasibility, from an engineering standpoint, of developing the subject site with residential and/or garden apartment type structures.

9. In making his analysis and arriving at his conclusions, he made two inspections at the site, at one of which he took photographs (July 9, 1976—Exhibit D-), studied the topographical maps (Exhibit J-), and reviewed Mr. Zimmerman's proposed development plan (Exhibit D-).

10. He also utilized geological profiles prepared by the Port of New York Authority which contained boring data regarding the subject site and which was prepared in connection with a jet port feasibility study of the site in the 1960's. In addition, his firm conducted its own geological reconnaissance and sub-surface study in early 1973 of the subject property, analysing the soil and sub-surface conditions, elevations and geology.

11. He would describe the subject site, from a soil engineering standpoint, essentially as follows:

(a) The site is located in what is historically known as the Great Swamp, which is a geological description of the area, the area having originally consisted of a depression formed by a glacier, which depression has been filled in by sediment over thousands of years. The Great Swamp, while it contains many low-lying areas and some wet ones, is not by any means in its totality a "swamp" in the layman's sense of the term, in that it contains substantial areas of sufficient elevation for construction and additional areas where construction is easily feasible within recognized tolerances of fill. In other words, the area, despite its name, is very developable from an engineering standpoint, as will be further pointed out below when it is compared with other "swampy" areas such as the Hackensack Meadowlands;

(b) The elevations on the subject site range from 228 feet above sea level to 236 feet above sea level. The recognized minimum elevation for construction of occupied structures both as an industry standard and as to the then existing requirements of Harding Township, was 235 feet, so that the subject site could to some extent be developed without fill and in other areas could be developed with a reasonable amount of fill, depending upon the use. The elevation characteristics of this site may be compared with the Hackensack Meadowlands, the development of which he and his firm have been involved in for a number of years. To illustrate, the Hackensack Meadowlands elevation is plus 3 and the required elevation to prevent flooding is plus 11. Thus, the amount of fill needed, by and large, to prepare the Hackensack Meadowlands for construction ranges between 15 feet and 20 feet in light of the fact that approximately 8 to 15 feet of muck excavation is initially required. This is, of course, a reflection of the fact that the soil conditions in terms of soil com-

position and water are substantially poorer in the Meadowlands than in the subject site. The same may be said of other sites which he has worked on and on which building has taken place, such as Hatfield Swamp in the Parsippany, Morris County, New Jersey, area, and the vicinity of the Morristown airport;

(c) The soil conditions on the subject site are from 1 to 1½ feet of surface top soil and organic material underlain by approximately 10 feet of stiff sand and clay. Below this level between 60 and 80 feet of soft clay exists and underlies bedrock at approximately a depth of 80 feet.

12. He has estimated the cost, based on 1971 to 1973 prices, of filling and grading the subject site for 3 acre residential use. Assuming that one wished to develop the site of 221 acres with 3 acre ersidential lots, the average cost of preparing the lot, including stripping, filling and grading, would range between approximately $22,000 and $60,000 or more per lot. This range would depend upon whether the bare minimum was filled and graded (solely the house and immediately surrounding area) or whether the entire 3 acres was graded at 235 feet. It would not be realistic to expect one to grade only the immediate area, but it would not be absolutely necessary to grade the entire 3 acres.

13. He has estimated the cost, based upon 1971 to 1973 costs, of stripping, filling, and grading the proposed garden apartment project in the form presented by Mr. Zimmerman's development plan (Exhibit D-). His estimate includes stripping, filling and grading for the above units, the parking lots, the area immediately surrounding the structures, and the interior roadways, plus the other improvements shown on the site plan such as tennis courts and the swimming pool. His figure also includes the site of the sewerage treatment plant.

14. His estimate of the cost for the foregoing improvements is $178,700.

15. He has an opinion as to whether the subject property is buildable from a soil engineer's standpoint. His opinion is that it is absolutely buildable and that the only question, not from an engineering but from an economical standpoint, is cost, in that the cost per unit, for example, for one family sites, is extremely high, whereas the cost per unit on another type of development, such as the proposed garden apartment project, is considerably lower. It is not, in his opinion, out of the ordinary to develop land with the type of soil and water characteristics shown by this land, and he and his firm have worked on hundreds of projects involving equivalent or poorer soil conditions. The most striking example, stated above, is the Hackensack Meadowlands, which has for the past 10 to 15 years been in a state of extremely active growth and development.

16. In terms of the nature and characteristics of the soil on the subject site, the site is easily qualified to support garden apartment units of two stories or less without the necessity of pilings and with the installation of normal foundations.

TESTIMONY OF WILLIAM F. SELDERS

William F. Selders will testify on direct examination as follows:

1. He is a licensed professional engineer in New York and New Jersey.

2. He is presently employed by Pandullo Quirk Associates of Wayne, New Jersey, engineering consultants.

3. He received a B.S. in Civil Engineering from Rutgers University in 1963 and a M.S. in Civil Engineering from New York University in 1972.

4. He is an Associate Member of the American Society of Civil Engineers.

5. He is licensed in New Jersey since 1969 and in New York since approximately 1972.

6. He is Division Director of the Reports and Studies Department of Pandullo Quirk Associates. In such capacity he has had extensive experience in a variety of waste water management (sewerage treatment plants) projects, including technical project manager of waste water treatment plant design.

7. Among the projects he has worked on are apartment house complexes in Morris County, New Jersey, including projects in Mt. Olive and Randolph Township, New Jersey. He has designed sewerage treatment plants for apartment complexes ranging from 15 units to 500 units.

8. He has done engineering reports for sewerage treatment facilities in Trenton, New Jersey, Cape May, New Jersey, Burlington County, New Jersey, Bergen County, New Jersey and various other locations.

9. The firm of Pandullo Quirk Associates is the second largest firm in New Jersey (out of approximately 50) doing sewerage treatment design work. It has been in existence under various names since 1961 and it has a staff of approximately 40 engineers.

10. He was retained on behalf of Wildlife Preserves, Inc. in this matter for the purpose of determining the feasibility and approximate cost of a sewerage treatment plant during the period 1971 to 1973 on the site which is the subject of this case.

11. In making his study and review and arriving at his conclusions, he examined topographical maps of the area (Exhibit J-), the proposed site plan of Mr. Zimmerman (Exhibit D-), various applicable written criteria issued by the New Jersey Division of Environmental Protection (D.E.P.), and applicable regulations of the New Jersey Department of Health. He also personally inspected the subject site.

12. Based upon the testimony of Mr. Zimmerman, he assumed some 396 garden apartment units on the site of approximately 115 acres, with an average population per unit of slightly over 2, or a total population for the project of 825 persons. Using these figures, he concludes that a sewerage treatment plant was required with a total capacity of 61,875 gallons per day. He based this on 75 gallons per person per day, which was the applicable standard of the New Jersey D.E.P. and is also generally regarded as the appropriate standard in the industry based on his knowledge and experience.

13. The foregoing capacity requirement, which is, incidentally, a liberal capacity requirement, requires a treatment plant occupying approximately 5,000 square feet of

land area. The "plant" would not necessarily consist of an enclosed structure but rather a series of interconnected pipes and process units. It would be a standard type "plant" used on dozens of projects in his experience.

14. The cost of construction of the aforesaid plant in the years 1971 to 1973 would be approximately $183,660. This total has been arrived at by checking costs from vendors for that period, checking other source materials in the office and in the industry, and based upon his knowledge and experience. Additional or lesser capacity of the plant on a per person (per acre) basis would result in an increase or decrease to the extent of approximately $200 per person.

15. He has an opinion as to whether the above described plant is feasible from an engineering standpoint for the subject site during the years 1971 to 1973, approximately, based upon site and topographical conditions and the nature of the proposed development. It is his testimony that it is clearly feasible.

FINAL JUDGMENT

(Original Filed March 1, 1977)

This matter, a condemnation proceeding instituted by the United States of America for determination of the just compensation to be awarded to Wildlife Preserves, Incorporated (hereinafter the Condemnee) as the former owner of Tract 219D which was taken by the Government and which is more particularly described in the Declaration of Taking herein, came on for final hearing on November 8, 1976; and the Court at that time having considered the submissions and arguments of counsel, and having ruled that the submission to the jury of the evidence proffered by the Condemnee regarding the probability of a zone change in the Township of Harding would require the jury to impermissibly pass upon the constitutionality of the existing zoning ordinance, and having determined that the jury's consideration of the probability of a zone change based upon the Condemnee's proffer of proof would be too speculative; and the parties having stipulated a verdict of $1,150.00 per acre as the value of Condemnee's property, without consideration of the element of probability of zone change. and having further stipulated that such a verdict shall be without prejudice to the Condemnee's right to appeal from the Court's ruling regarding the submission to the jury of evidence of a probable zone change.

IT IS on this 1st day of March , 1977,

ORDERED and ADJUDGED as follows:

1. Condemnee is not permitted to present to the jury its proffered evidence regarding the probability of a zone change in the Township of Harding, in accordance with the Court's ruling as read into the transcript of these proceedings on November 8, 1976.

2. That, absent the element of probability of zone change, the sum of $254,840.00 is the full, fair and just compensation payable by the United States of America for the taking of Tract 219D, together with any improvements thereon and appurtances thereunto belonging, and

IT APPEARING to the Court that the aggregate sum of $188,600.00 estimated compensation, was disbursed to the Condemnee pursuant to an Order of this Court dated July 13, 1971, it is therefore

ORDERED, ADJUDGED and DECREED that a deficiency in the amount of $66,240.00 exists between the amount of compensation disbursed and the amount of compensation adjudicated herein; it is further

ORDERED, ADJUDGED and DECREED that the plaintiff be and is hereby directed to deposit into the registry of this Court to the credit of the Condemnee, the sum of $66,240.00, together with interest thereon at the rate of 6% per annum from March 2, 1971 to the date of its deposit, inclusive; it is further

ORDERED, ADJUDGED and DECREED that title to the estate set forth in the Declaration of Taking in the parcel of land described as Tract 219D vested in the Declaration of Taking; it is further

ORDERED, ADJUDGED and DECREED that all taxes, assessments, and other such governmental charges, and all other liens and claims of whatsoever nature existing against said property on the date of the filing of the Declaration of Taking transferred therefrom to the funds deposited in the Registry of this Court, to the end that the United States of America may have an unencumbered estate, right, title and interest in said property; it is further

ORDERED, ADJUDGED and DECREED that upon deposit of the sum of $66,240.00, together with interest thereon as aforesaid, the Clerk of this Court shall, without further Order of this Court, distribute said sum and interest thereon to Wildlife Preserves, Incorporated and transmit the same to it in care of its attorney of record, Laurence B. Orloff, Esq., Orloff, Lowenbach, Stifelman & Siegel, Gateway One, Newark, New Jersey 07102; and it is further

ORDERED, ADJUDGED and DECREED that after the sum of $66,240.00, together with interest thereon, has been disbursed to the Condemnee, Tract 219D is to be closed and stricken from the docket in this proceeding, subject to the right of the Condemnee to prove an enhancement of value over and above that stipulated as the verdict herein, attributable to the probability of rezoning in the event that the United States Court of Appeals for the Third Circuit determines that the exclusion of the Condemnee's evidence on the probability of rezoning described above was improper.

/s/ George H. Barlow
GEORGE H. BARLOW, JUDGE
UNITED STATES DISTRICT COURT

The undersigned hereby agree to the form of the within Final Judgment.

ORLOFF, LOWENBACH,
STIFELMAN & SIEGEL,
Attorneys for Condemnee

By: /s/ Laurence B. Orloff
LAURENCE B. ORLOFF

JONATHAN L. GOLDSTEIN,
United States Attorney
Attorney for Plaintiff

By: /s/ Z. Lance Samay
Z. LANCE SAMAY,
Assistant U.S. Attorney
Chief, Civil Division

I hereby certify that the foregoing is a TRUE COPY of the original on file in my office.

ANGELO W. LOCASCIO,
Clerk

per: /s/ Mickie D. Shanklin
MICKIE D. SHANKLIN
Deputy

Supreme Court, U. S.
FILED
AUG 2 1978
MICHAEL RODAK, JR., CLERK

No. 77-1754

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILDLIFE PRESERVES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

JACQUES B. GELIN,
NEIL T. PROTO,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals is unreported and is reproduced in the appendix to the Petition at 1a.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1978 (Pet. App. 2a), and a timely petition for rehearing *en banc* was denied on February 9, 1978 (Pet. App. 3a). On May 9, 1978, Mr. Justice Brennan granted an extension of time to file the petition for a writ of certiorari to and including June 9, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).[1]

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[1]Pet. 2. The proper statutory basis for invoking this Court's jurisdiction is 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court, in a condemnation proceeding held before a jury, abused its discretion by denying, as too speculative, a landowner's proffer of evidence on the probability of a zoning change, where the only evidence to support such a probability was the fact of the landowner's state court lawsuit challenging the zoning ordinance's constitutionality, admittedly filed in anticipation of the federal condemnation proceeding.

STATEMENT

1. Petitioner, Wildlife Preserves, was the owner of approximately 616 acres of land in Harding Township, New Jersey. Petitioner's property was classified "R-1" in 1967, which limited the property's use to one-family private dwellings or related structures on a minimum lot size of 3 acres.[2] Its land was retained in its natural state as a wildlife sanctuary.

"[C]oncededly in anticipation of the imminent condemnation proceedings in the Federal Court,"[3] whereby the United States intended to acquire a portion of petitioner's property for inclusion in the Great Swamp National Wildlife Refuge, petitioner filed a complaint on Novermber 20, 1970, in the Superior Court of New Jersey seeking to have the existing Harding Township zoning classification declared invalid under the New Jersey Constitution and the Fourteenth Amendment. On March 2, 1971, the United States acquired title by condemnation

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[2]See Appendix on Behalf of Petitioner, filed in the court of appeals, p. 83a (hereinafter "C.A. App.").

[3]C.A. App. 192a. Petitioner was advised by the United States on October 8, 1970, that it intended to condemn its land within the year. See Exhibit III, History of Negotiations, filed in the court of appeals.

of 551 acres of petitioner's property. The Superior Court of New Jersey concluded that petitioner could not challenge the propriety of a zoning classification for land it no longer owned. However, it also concluded that petitioner's continued ownership of approximately 66 acres permitted it to challenge the original R-1 zoning classification, but only in the state court. The Superior Court stated that "the challenge to the R-1 zone [is not] one which should be litigated in the Federal condemnation proceeding, as this challenge [to the R-1 zoning classification] will have effects far beyond the condemned properties and will involve questions of constitutional law with which this Court is probably far more familiar" (C.A. App. 90a).

On June 12, 1973, while petitioner's action was still pending in the Superior Court, Harding Township amended its zoning ordinance and placed petitioner's remaining 66 acres in a "farm, recreation and conservation zone" (C.A. App. 194a). Petitioner moved to amend its state court complaint to include an attack on the new ordinance, but later withdrew the motion. (*ibid.*) The Superior Court dismissed petitioner's complaint as moot, expressly pretermitting a determination of the constitutionality of the original R-1 zoning classification (C.A. App. 175a). In its opinion, however, the Superior Court also found that: (1) despite the fact the R-1 zoning classification had been in effect since 1967, petitioner never made any complaint about it (C.A. App. 184a-185a); and (2) petitioner, as a nonprofit corporation under New Jersey law, may be unable to use its property for any purpose other than that to which it has been dedicated (C.A. App. 189a).

2. In January 1974, the district court partially granted petitioner's motion to present evidence on the probability of a zoning change. It stated that "if, as of the date of

taking, there exists a reasonable probability of a change in the zoning ordinance in the reasonably near future, such is a proper factor for consideration in valuing the condemned land" (Pet. App. 6a). The ruling was conditioned, however, upon petitioner's satisfying the court that there was sufficient evidence to submit this alleged element of value to the jury, particularly in light of the "unique nature" (Pet. App. 7a-8a) of petitioner's contention (Pet. App. 8a).

During the condemnation hearing,[4] petitioner acknowledged that its state court lawsuit was the "vehicle for determination" (C.A. App. 121a) by its expert witnesses that a zoning change was probable, and that these expert witnesses would "conclude that a hypothetical buyer, knowing about this lawsuit, would have taken into account the probability of rezoning as a result of the lawsuit." (*ibid.*). In light of that disclosure, the district court denied petitioner's request to present evidence and expert testimony to the jury on the probability of a zoning change premised on the unconstitutionality of the R-1 zoning classification. It concluded that petitioner's contention would impermissibly require experts to testify on matters of law (Pet. App. 19a-20a) and the jury to pass upon the constitutionality of the R-1 zoning ordinance. Moreover, the evidence petitioner relied upon was too speculative for the court or the jury to consider.[5] The

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[4]Prior to the hearing, the United States and petitioner entered into an agreement as to the value of the 551 acres, with the reservation that if petitioner prevailed on its "unconstitutionality" contention, then a newly impaneled jury would determine only the incremental value, if any, attributable to the zoning change above the already agreed value.

[5]The district court's final judgment of March 1, 1977, is reproduced as an appendix to this brief. It was not included in the petitioner's appendix.

district court did permit petitioner to introduce into the record the testimony its expert witnesses would have given so that it could be reviewed by the court of appeals.

The court of appeals, after reviewing the briefs and record, affirmed the district court's decision based on this Court's decision in *United States* v. *Reynolds*, 397 U.S. 14, and its own decision in *United States* v. *3,544 Acres in Philadelphia County, Pennsylvania*, 147 F. 2d 596, both relied upon by the United States (Pet. App. 1a). A petition for rehearing *en banc* was denied (Pet. App. 3a).

ARGUMENT

1. The district court gave petitioner the opportunity to proffer evidence, including a summary of expert testimony, on the alleged unconstitutionality of the R-1 zoning classification. The evidence was based on the presumed occurrence of a future "legal" event; namely, a decision by a New Jersey State court that the R-1 zoning classification was unconstitutional. The *only fact* in existence at the time the United States condemned petitioner's property to support such a presumption was the pendency of petitioner's state court lawsuit. Consequently, the testimony of petitioner's expert witnesses would have been directed toward proving a legal conclusion (*i.e.*, the R-1 classification would be changed because it violated the New Jersey and federal constitutions) or would have proceeded on a legal presumption (*i.e.*, the R-1 classification was unconstitutional).[6]

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[6]*E.g.*, Mr. Zimmerman (Pet. App. 29a) would render "an opinion as to the reasonableness of the zoning * * * and * * * the most appropriate and most probable use of the subject property as a result of change or *invalidation* of the R-1 Zoning * * *" (*id.* at 30a, emphasis added). Moreover, he would state (1) that "[t]he consensus of opinion was that * * * [R-1 zoning was] unreasonable; and likely

The district court correctly concluded that testimony on legal matters was beyond the competence of a witness, *United States* v. *Turner*, 11 How. 662, 667; *Huff* v. *United States*, 273 F. 2d 56, 61 (C.A. 5); *Lamar* v. *Micou*, 114 U.S. 218, 223, and was based on a future event "which while possible [was] not shown to be reasonably probable * * *." *Cameron Development Corp.* v. *United States*, 145 F. 2d 209, 210 (C.A. 5); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 274, 280-281.[7] The district

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to be declared *invalid by a court* * * *" (*id.* at 32a; emphasis added); (2) the zoning ordinance "would be changed by virtue of the pending Court action" (*id.* at 33a); and (3) the ordinance "in fact constituted, a denial of a reasonable * * * use" (*ibid.*) and "would not satisfy the general welfare criteria of zoning" (*id.* at 34a). Furthermore, Mr. Zimmerman's proposed testimony indicates he would testify on "whether the uses permitted [by the R-1 zoning] satisfy *the statutory purposes of zoning* and in particular promote the general welfare] * * *" (*id.* at 32a; emphasis added). Cf. *Huff* v. *United States*, *supra*, 273 F. 2d at 61 (testimony of Herman Cherry).

Finally Mr. Scheil's (Pet. App. 45a), Mr. Selder's (Pet. App. 50a) and Mr. Lasser's (Pet. App. 38a) testimony assumes that the property can be developed pursuant to a zoning classification other than R-1. Cf. *Scott Lumber* v. *United States*, 390 F. 2d 388, 395 (C.A. 9).

[7]Petitioner relies upon *State* v. *Market Associates*, 340 A. 2d 663 (App. Div. N.J.) for the proposition that where a "challenge" to zoning regulations was pending at the time of the filing of the condemnation, the court would determine, in the eminent domain proceeding, the likelihood that those zoning regulations would be invalidated" (Pet. 15). Presuming the law of New Jersey has application in a federal condemnation proceeding, petitioner's reliance on *Market Associates* is misplaced. In *Market*, the court noted the "unusual, almost unique, circumstances present in this case" (340 A. 2d at 664); namely, that the zoning regulation governing the condemned property had already been declared unconstitutional in an earlier judicial proceeding (340 A. 2d at 665).

In a companion case to *Market* involving the petitioner, *State* v. *Wildlife Preserves, Inc.*, 340 A. 2d 665 (App. Div. N.J.), the New Jersey court reached a contrary result. The court there noted that the zoning regulations affecting the landowner's property had been in

court properly exercised its discretion in a condemnation proceeding, *United States* v. *Reynolds*, 397 U.S. 14, 19-20, by excluding this proffered evidence as too speculative to submit to a jury. *Olson* v. *United States*, 292 U.S. 246, 255-257; *United States* v. *3,544 Acres in Philadelphia County, Pennsylvania*, 147 F. 2d 596, 598 (C.A. 3). No error of law is involved which warrants review by this Court.

2. In the court of appeals, the United States acknowledged that its decision to file a declaration of taking was, in part, the basis for the state court's determination that petitioner could no longer prosecute its claims of unconstitutionality. There is however, nothing in the record to suggest, as petitione, now does (Pet. 10), that this decision by the United States was the result of "collusion" with Harding Township. On the contrary, the record demonstrates that petitioner: (1) filed its state court action "concededly in anticipation of the imminent condemnation proceedings in the Federal Court" (C.A. App. 192a; see n. 3, *supra*); and (2) had never formally complained about the R-1 zoning although it was in existence for approximately 4 years prior to the taking (C.A. App. 184a-185a). See *State* v. *Wildlife Resources, Inc.*, *supra*, n. 7. Moreover, the State court found that petitioner, as a nonprofit New Jersey corporation, may be unable to use its property for any purpose other than that to which it has been dedicated (*i.e.*, wildlife preserve),

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effect for 3 years without challenge and that "as of the date of this taking the likelihood that the controlling use regulations would be declared invalid was exceedingly remote, at best * * *" (340 A. 2d at 666). Moreover, throughout the trial, the landowner had taken the "undeviating position * * * that, by reason of its peculiar physcial characteristics, the land taken was not susceptible to the construction of buildings on it, but rather 'has to be used in its natural state' " (340 A. 2d at 666-667). Consequently, the court concluded that he could not claim the land was suscepitable of a different use.

regardless of any zoning change. Cf. *State* v. *Wildlife Preserves, Inc., supra*, 340 A. 2d at 666-667. These factors indicate the very speculative nature of petitioner's contentions concerning the constitutionality of the R-1 zoning classification and the propriety of the district court's decision.

CONCLUSION

The petition for a writ certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

JACQUES B. GELIN,
NEIL T. PROTO,
Attorneys.

JULY 1978.

DOJ-1978-08

ORIGINAL FILED
March 1, 1977
ANGELO W. LOCASCIO, CLERK

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 295-7

HON. GEORGE H. BARLOW

UNITED STATES OF AMERICA,

Plaintiff,

v.

376.2 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF MORRIS, STATE OF NEW JERSEY, HAZEL DUDLEY, ET AL.,

Defendants.

FINAL JUDGMENT

This matter, a condemnation proceeding instituted by the United States of America for determination of the just compensation to be awarded to Wildlife Preserves, Incorporated (hereinafter the Condemnee) as the former owner of Tract 219D which was taken by the Government and which is more particularly described in the Declaration of Taking herein, came on for final hearing on November 8, 1976; and the Court at that time having considered the submissions and arguments of counsel, and having ruled that the submission to the jury of the evidence proffered by the Condemnee regarding the probability of a zone change in the Township of Harding would require the jury to impermissibly pass upon the constitutionality of the existing zoning ordinance, and having determined that the jury's consideration of the probability of a zone change based upon the Condemnee's proffer of proof would be too speculative; and the parties having stipulated a verdict of $1,150.00 per acre as the value of Condemnee's property, without consideration of the element of probability of zone change, and having further stipulated that such a verdict shall be without prejudice to the Condemnee's right to appeal from the Court's ruling regarding the submission to the jury of evidence of a probable zone change,

IT IS on this 1st day of March, 1977,

ORDERED and ADJUDGED as follows:

1. Condemnee is not permitted to present to the jury its proffered evidence regarding the probability of a zone change in the Township of Harding, in accordance with the Court's ruling as read into the transcript of these proceedings on November 8, 1976.

2. That, absent the element of probability of zone change, the sum of $254,840.00 is the full, fair and just compensation payable by the United States of America

for the taking of Tract 219D, together with any improvements thereon and appurtances thereunto belonging, and

IT APPEARING to the Court that the aggregate sum of $188,600.00 estimated compensation, was disbursed to the Condemnee pursuant to an Order of this Court dated July 13, 1971, it is therefore

ORDERED, ADJUDGED and DECREED that a deficiency in the amount of $66,240.00 exists between the amount of compensation disbursed and the amount of compensation adjudicated herein; it is further

ORDERED, ADJUDGED and DECREED that the plaintiff be and is hereby directed to deposit into the registry of this Court to the credit of the Condemnee, the sum of $66, 240.00, together with interest thereon at the rate of 6% per annum from March 2, 1971 to the date of its deposit, inclusive; it is further

ORDERED, ADJUDGED and DECREED that title to the estate set forth in the Declaration of Taking in the parcel of land described as Tract 219D vested in the United States of America on the date of the filing of the Declaration of Taking; it is further

ORDERED, ADJUDGED and DECREED that all taxes, assessments, and other such governmental charges, and all other liens and claims of whatsoever nature existing against said property on the date of the filing of the Declaration of Taking transferred therefrom to the funds deposited in the Registry of this Court, to the end that the United States of America may have an unencumbered estate, right, title and interest in said property; it is further

ORDERED, ADJUDGED and DECREED that upon deposit of the sum of $66,240.00, together with interest thereon as aforesaid, the Clerk of this Court shall, without further Order of this Court, distribute said sum and interest thereon to Wildlife Preserves, Incorporated and transmit the same to it in care of its attorney of record, Laurence B. Orloff, Esq., Orloff, Lowenbach, Stifelman & Siegel, Gateway One, Newark, New Jersey 07102; and it is further

ORDERED, ADJUDGED and DECREED that after the sum of $66,240.00, together with interest thereon, has been disbursed to the Condemnee, Tract 219D is to be closed and stricken from the docket in this proceeding, subject to the right of the Condemnee to prove an enhancement of value over and above that stipulated as the verdict herein, attributable to the probability of rezoning in the event that the United States Court of

Appeals for the Third Circuit determines that the exclusion of the Condemnee's evidence on the probability of rezoning described above was improper.

/s/ George H. Barlow
GEORGE H. BARLOW, JUDGE
UNITED STATES DISTRICT COURT

The undersigned hereby agree to the form of the within Final Judgment.

ORLOFF, LOWENBACH,
STIFELMAN & SIEGEL
Attorneys for Condemnee

By /s/ Laurence B. Orloff
LAURENCE B. ORLOFF

JONATHAN L. GOLDSTEIN
United States Attorney
Attorney for Plaintiff

By /s/ Z. Lance Samay
Z. LANCE SAMAY
Assistant U. S. Attorney
Chief, Civil Division

I hereby certify that the foregoing is a TRUE COPY of the original on file in my office.

Angelo W. Locascio,
Clerk